TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 803

STEUART PURCELL, EDMUND H. BUDNITZ AND ARTHUR H. BRICE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL., APPELLANTS,

vs.

THE UNITED STATES OF AMERICA, THE CONFLUENCE AND OAKLAND RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

FILED DECEMBER 15, 1941.

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INDEX.

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[fol. 1] [Caption omitted]

[fol. 2]

IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil Docket No. 1378

STEUART PURCELL, EDMUND H. BUDNITZ and ARTHUR H. BRICE, Constituting the Public Service Commission of Maryland, and McCullough Coal Corporation, a Maryland corporation, Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, THE CONFLUENCE AND OAKLAND RAILROAD COMPANY and The Baltimore and Ohio Railroad Company, Defendants

BILL OF COMPLAINT—Filed September 15, 1941

To the Honorable, The Judges of the District Court of the United States for the District of Maryland:

First: That the Plaintiff, the Public Service Commission of Maryland, is a commission or board appointed by the Governor of the State of Maryland, pursuant to appropriate legislative authority, for the purposes of, inter alia, regulating the rates and services of various corporations, including railroads and other common carriers, engaged in the rendition of public service within the State of Maryland and the said Steuart Purcell, Edmund H. Budnitz and Arthur H. Brice are now and have been at all times since September 2, 1941, the persons comprising the said Public Service Commission of Maryland and that the statutory authority and duties of the said last mentioned Plaintiff are set forth in Sections 344 to 429 of Article 23 of Flack's Annotated Code of Public General Laws of Maryland, 1939 Edition.

That the Plaintiff, McCullough Coal Corporation, is a corporation duly organized and existing under and by virtue of the laws of the State of Maryland and owns and operates, and for more than twenty years has owned and [fol. 3] operated coal mines, including properties, equip-

ment and appurtenances thereto, at or near the village of Friendsville in Garrett County, Maryland, and which said mines, equipment and appurtenances are adjacent to the line of the railroad now owned by The Confluence and Oakland Railroad Company, one of the Defendants herein and a wholly-owned subsidiary of The Baltimore and Ohio Railroad Company, and which said line is operated by said The Baltimore and Ohio Railroad, a Defendant herein, as lessee.

That the Plaintiffs were at all times parties to a proceeding before the Interstate Commerce Commission (hereinafter referred to as "the Commission") entitled "In The Matter of Application Of The Confluence And Oakland Railroad Company And The Baltimore And Ohio Railroad Company, Under Section 1 (18), Part I, Of The Interstate Commerce Act, As Amended, For A Certificate Of Public Convenience And Necessity To Abandon A Line Of Railroad And Operation Thereof", Finance Docket No. 12742, and the Plaintiffs were adversely affected by an order and certificate of the Commission entered on September 2, 1941 permitting and authorizing the Defendants, The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, to abandon the operation of a certain line of railroad extending from Confluence & Oakland Junction, Pennsylvania, to Kendall, Maryland, a distance of approximately 19.79 miles, and which said order is hereinafter more fully described and the enforcement of which is herein sought to be temporarily and permanently restrained.

Second: That the Defendant, United States of America, is made a party defendant in this matter, in conformity with the provisions of the Act of Congress approved March 3, 1911, as amended, 28 *U. S. C. A. par.* 46.

That the Defendant, The Confluence and Oakland Railroad Company, is a railroad corporation organized and existing under and by virtue of the laws of the State of Maryland and the Commonwealth of Pennsylvania, and, [fol. 4] as such, owns the above mentioned line of steam railroad located in Somerset and Fayette Counties, Pennsylvania, and Garrett County, Maryland, which it has been authorized and directed to abandon by the order and certificate of the Commission here involved. That said Defendant is made a party to this proceeding for the purpose

of securing an order or decree herein whereby it may be enjoined from abandoning said line of railroad.

That the Defendant, the Baltimore and Ohio Railroad Company, is a railroad corporation organized and existing under and by virtue of the laws of the State of Maryland and, as lessee of The Confluence and Oakland Railroad Company, operates the above described line of steam railroad, which operation it has been authorized and directed to abandon by the order and certificate of the Commission here involved. That the said Defendant is likewise made a party to this proceeding for the purpose of securing an order or decree herein whereby it may be enjoined from abandoning the said line of railroad or discontinuing the operation thereof.

That the said The Baltimore and Ohio Railroad Company and The Confluence and Oakland Railroad Company are hereinafter jointly referred to as "the Defendant Carriers".

Third: That the Plaintiffs herein institute this action against the United States of America under the Act of Congress approved October 22, 1913, as amended (28 *U. S. C. A.* 41 (28), 43-45, 45A-46, 47, 48) and pursuant thereto sues to enjoin, set aside, suspend and annul an order and certificate of the Commission in the aforementioned proceedings designated and known as Finance Docket No. 12742 and which said order and certificate purportedly permits and authorizes the Defendants, The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, to abandon the operation of the aforementioned line of railroad extending from Confluence & Oakland Junction, Pennsylvania, south to Kendall, Maryland, approximately 19.79 miles and which said line of railroad is located within the aforementioned Somerset and [fol. 5] Fayette Counties, Pennsylvania, and Garrett County, Maryland.

Fourth: That the Plaintiff, McCullough Coal Corporation (hereinafter referred to as "the Coal Company"), is the owner of bituminous coal lands and mining rights in and to lands comprising approximately 1,000 acres located in Garrett County, Maryland. The Coal Company owns, in addition thereto, loading facilities, trackage, railway cars, buildings, equipment and appurtenances, as well as an office building and residences for families of its employees, and all of which said facilities and properties are likewise

located in Garrett County, Maryland, at or near the Village of Friendsville. The properties of the Coal Company include four seams of bituminous coal, one of which is now being mined and three of which are available for opening although mining operations with respect to said last mentioned three seams have not yet actually been commenced. That substantially all of the Coal Company's production of coal is shipped by rail over the aforementioned line of railroad operated by the Defendant Carriers destined for various points of consignment located along the eastern seaboard. An industrial siding is owned and maintained by the Defendant Carriers and which provides facilities, immediately adjacent to the property of the Coal Company, for the loading of the coal produced by the Coal Company upon the cars of the Defendant Carriers and no other rail service or other feasible means of transporting such coal is available to the Coal Company. All shipments of coal by the Coal Company have, since the commencement of its operations, been made and are presently being made over the aforementioned line of railroad of the Defendant Carriers, the abandonment of which has been authorized and approved by the said order of the Commission dated September 2, 1941.

That during the period from 1921 to 1933 coal shipments were made by the Coal Company over the aforesaid line of railroad of the Defendant Carriers averaging 27,211 tons annually and during the period from 1934 to 1939 such shipments averaged 22,386 tons annually. During the calendar year 1940 such shipments made by the Coal Com-
[fol. 6] pany aggregated 26,355 tons and during the calendar year 1941, the shipments of coal of the Coal Company over the aforesaid line of railroad of the Defendant Carriers have been in the following monthly amounts:

1941	
January	3,213
February	3,998
March	6,020
April	5,698
May	5,110
June	5,169
July	3,680
Total	32,888

That the Coal Company's mine has been operated continuously for more than twenty years and extensive enlargements of its facilities have been made since its establishment and up to the present time.

That its properties, loading facilities, building and equipment have a value in excess of $300,000.00.

Fifth: That the village of Friendsville, Maryland, and the residents of the territory surrounding Friendsville, Maryland, and adjacent to the line of railroad, hereinafter more particularly referred to, are and have been for many years dependent upon the operation of the said line of railroad for adequate transportation service. A very large percentage of the residents of the village of Friendsville and the surrounding territory is dependent upon the operation of the coal mine of the Coal Company for its subsistence and the entire community would be irreparably damaged and injured, if not completely distorted, by a cessation of the operations of the coal mine and a loss of the service provided by the line of railroad.

Sixth: That the Defendant, The Confluence and Oakland Railroad Company, was formed in the year 1890 by a consolidation and merger of the Confluence & State Line Railroad and the State Line & Oakland Railway. During the same year the entire property was leased for 999 years to the Baltimore & Ohio, the owner of all the outstanding capital stock of The Confluence and Oakland Railroad Company. The line operates through a semi-mountainous section of Southwestern Pennsylvania and Western Mary-
[fol. 7] land and the service thereon consists of a mixed passenger and freight train in each direction on Tuesdays and Saturdays of each week, serving numerous rural communities and towns located in the states of Pennsylvania and Maryland with an estimated aggregate population of approximately 2,000 persons. The said line of railroad, as so operated, runs from a point at or near Rockwood, Pennsylvania, through the Confluence & Oakland Junction, Pennsylvania, to a point at or near Kendall, Maryland, connecting at Confluence & Oakland Junction with the main line of the Baltimore and Ohio Railroad.

The operation of the line of railroad of the Defendant Carriers, the abandonment of which has been authorized and approved by the aforementioned order and certificate of the Commission dated September 2, 1941, is and has for

many years been profitable to the Defendant Carriers and sufficient tonnage of unmined coal is owned by the Coal Company to assure substantial shipments over the said line of railroad in the approximate quantities presently being shipped for a period of at least eighty years from the date of the institution of these proceedings. The operation of the said line of railroad is, therefore, not a burden upon interstate commerce but is an advantageous and profitable operation to the Defendant Carriers, providing substantial movements of freight in interstate commerce and in furtherance of the public convenience and necessity.

Seventh: That the Defendant, United States of America, through its agency, the Secretary of War, acting pursuant to the Act of Congress of July 28, 1938 (33 U. S. C. A. par. 701-b-706), has commenced the construction of a certain flood-control dam across the Youghiogheny River located at a point on the aforesaid line of railroad about one mile from Confluence, Pennsylvania. That the reservoir created by the said dam, when at full elevation, will inundate approximately 15.24 miles of the aforesaid railroad line from the dam site to a point upstream near Friendsville, Maryland, leaving capable of operation only the section of railroad below the dam, in the absence of any relocation of the said line of railroad, will be to deprive the town of Friends-[fol. 8] ville and the Coal Company of railroad service of any kind whatsoever. That, pursuing his plan to construct a dam as aforesaid, the Secretary of War has acquired an option from the Defendant Carriers for the purchase of the affected part of the railroad line for the amount of $306,000.00, subject, however, to the approval by the Commission of the abandonment of the said line and railroad service by the said Defendant Carriers.

That the Defendant Carriers, at the behest of the Secretary of War, filed a joint application on or about January 15, 1940 for permission and authority to abandon the operation of the aforementioned line of railroad and hearings were thereafter held at Cumberland, Maryland, and Washington, D. C. before various examiners appointed and designated for that purpose by the said Commission. A report was filed by Examiner A. G. Nye on or about November 5, 1940 recommending that said application be denied and finding therein that the present and future public convenience and necessity did not permit of such abandonment. Ex-

ceptions to the aforementioned report were thereafter filed in behalf of the Secretary of War and the Defendant Carriers; and on March 6, 1941 Division 4 of the Commission entered or filed its report and order approving the aforementioned abandonment applied for by the Defendant Carriers and granting a certificate permitting the same, such certificate to be effective forty days after the issuance thereof.

A copy of the said report of Examiner Nye is filed herewith and made a part hereof and entitled "Plaintiffs' Exhibit No. 1", a copy of the said report and order of said Division 4 of the Interstate Commerce Commission is filed herewith and made a part hereof and entitled "Plaintiffs' Exhibit No. 2" and a copy of said certificate issued by Division 4 of the Interstate Commerce Commission on March 6, 1941 is filed herewith and made a part hereof and entitled "Plaintiffs' Exhibit No. 3".

That pursuant to the provisions of Sec. 17 of the Interstate Commerce Act, Part I (U. S. C. A., Title 49, Sec. 17, Subpar. 8-9), a petition for reconsideration was duly filed [fol. 9] by the Plaintiffs with the Commission and thereupon the Commission order- that the proceeding be opened for reargument and assigned the cause for hearing before the full Commission. On July 10, 1941 reargument of the entire proceeding was made before the Commission sitting as a whole and thereafter a report of the Commission on reargument and its order affirming the report and order of Division 4 were filed and entered. Said report of the Commission on reargument was dated as of July 31, 1941 but notice thereof was not received from the Commission by the Coal Company until August 14, 1941. A dissenting opinion was filed by Chairman Eastman, in which Commissioners Rogers and Patterson concurred. Commissioner Aitchison did not participate in the disposition of the case. A copy of the report of the Commission on reargument and of the said dissenting opinion is attached hereto and made a part hereof and entitled "Plaintiff's Exhibit No. 4".

That on September 2, 1941 the Commission entered its order affirming the aforementioned findings and conclusions of Division 4 of the Commission and providing in said order that the certificate issued by said Division 4 of the Commission on March 6, 1941 shall become effective from and after fifteen days from the date of said order of the Commission dated September 2, 1941. A copy of the said order

is attached hereto and made a part hereof and entitled "Plaintiff's Exhibit No. 5".

Eighth: That (i) the aforementioned report and certificate of Division 4 of the Commission dated March 6, 1941, (ii) the report of the Commission dated July 31, 1941 and (iii) the said order of the Commission dated September 2, 1941, are each unlawful, void and without legal force and effect and should be temporarily and permanently enjoined, set aside and annulled by this Court for the reasons that:

(1) The Commission was without jurisdiction or statutory authority to grant the relief prayed in the application of the Defendant Carriers for an abandonment of the line of railroad sought to be abandoned since such application on its face disclosed that the reasons or grounds therein [fol. 10] alleged in support of the same were unrelated to the public convenience and necessity.

(2) There was no substantial evidence before the Commission in the proceedings (Finance Docket No. 12742) to justify or support (i) the issuance of the report or certificate of Division 4 of the Commission dated March 6, 1941, (ii) the report of the Commission dated July 31, 1941 or (iii) the final order of the Commission entered in said proceedings on September 2, 1941.

(3) The application of the Defendant Carriers for an abandonment of the aforementioned line of railroad, as filed in the proceedings in question, and the granting thereof by the subsequent certificates and orders of the Commission were not based or grounded upon a consideration of the present or future public convenience and necessity as required by the Interstate Commerce Act but such application was filed by the Defendant Carriers and orders and certificates approving the same entered and issued by the Commission solely to facilitate construction of a flood-control project and in the absence of substantial evidence that the convenience and necessity of the transportation public or the promotion, protection or preservation of interstate commerce would be served.

(4) The record of the testimony and evidence in the proceedings before the Commission establishes as an uncontradicted fact that the line of railroad, the abandonment of which has been approved by the Commission, is now

and has for many years operated at a profit and is serving an essential public purpose in the furtherance of interstate commerce, the interest of the general transportation public and, in particular, the Plaintiff, McCullough Coal Corporation.

(5) The aforementioned orders and certificates issued by the Commission constitute arbitrary and capricious acts and a gross abuse of administrative discretion.

[fol. 11] (6) The aforementioned certificates and orders of the Commission constitute an unlawful exercise of its authority, are unsupported by substantial evidence and deprive the Plaintiff, McCullough Coal Corporation, of its property without due process of law and without just compensation therefor, and are in violation of the rights guaranteed to the Plaintiffs under the Constitution of the United States of America and the Fifth Amendment thereto.

(7) Unless the report and certificate of Division 4 of the Commission dated March 6, 1941, the report of the Commission dated July 31, 1941 and the order of the Commission dated September 2, 1941, are not set aside and annul-ed, and if a restraining order is not forthwith issued and the order of the Commission dated September 2, 1941 is not enjoined by this Court, the Defendants, The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, will proceed with the proposed abandonment of the line of railroad above-mentioned and the village of Friendsville, Maryland, the transportation public of the village of Friendsville, Maryland, the State of Maryland and the transportation public generally, as well as the Plaintiffs herein, will be deprived of railroad service and will suffer irreparable injury for which there is no adequate remedy at law.

Wherefore, in consideration of the premises and for as much as Plaintiffs are without remedy at law and their only protection must arise from the equitable jurisdiction of this Court, the Plaintiffs pray:

(a) That a writ of subpoena issue directed to the Defendants, commanding them and each of them to appear and answer fully to this Bill of Complaint, but not under oath, answer under oath being expressly waived.

(b) That this Court direct that due and proper notice [fol. 12] of this bill and proceeding issue and be served forthwith as prescribed in the said Act of Congress approved October 22, 1913 (28 *U. S. C. A. Secs.* 41 (28) & 43-48, *incl.*).

(c) That a court constituted as required by the said Act of Congress approved October 22, 1913 (28 *U. S. C. A.* 47) be immediately convened and that said court so constituted and convened grant a temporary stay or suspension in whole of the operation of the said order of the Interstate Commerce Commission dated September 2, 1941, as provided by the said section of said Act, upon three days' notice, restraining and suspending the operation and effect of said order or certificate for sixty days from the date of said order granting a temporary stay or suspension.

(d) That, upon five days' notice of the time and place of hearing having been given to the Attorney General of the United States and to the Interstate Commerce Commission and to the other Defendants herein, the Plaintiffs be granted a temporary injunction suspending and restraining the operation and effect in whole of said order or certificate issued by the Interstate Commerce Commission on September 2, 1941, until final decision upon this petition and application.

(e) That, upon final hearing, this Court constituted and convened as aforesaid enter a final decree herein perpetually and forever enjoining the operation and effect in whole of said order of the Interstate Commerce Commission dated September 2, 1941; said decree to adjudicate, hold, order and declare that the said (i) order or certificate of the Interstate Commerce Commission dated September 2, 1941, (ii) report or certificate of Division 4 of the Commission dated March 6, 1941 and (iii) report of the Commission dated July 31, 1941, are without warrant of law, are beyond the lawful authority of the said Commission, [fol. 13] are null and void and without legal effect and that they be set aside and forever annul-ed.

(f) That the temporary restraining order heretofore prayed be made to run against the Defendants, The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, requiring them to continue the operation of the said line of railroad from Confluence

& Oakland Junction, Pennsylvania, to Kendall, Maryland, throughout the pendency of this proceeding and until the final disposition of the Bill of Complaint by this Court.

(g) That Plaintiffs have and recover from the Defendants all proper costs of this suit.

(h) That Plaintiffs have such other and further relief as may be just and proper and equitable in the premises.

And Plaintiffs Will Ever Pray, Etc.

Steuart Purcell, Edmund H. Budnitz and Arthur H. Brice, constituting the Public Service Commission of Maryland, by Steuart Purcell, Chairman. Joseph Sherbow, General Counsel to the Public Service Commission of Maryland, 1731 Munsey Building, Baltimore, Maryland. McCullough Coal Corporation, By Ford C. McCullough, President. Clarence W. Miles, Benjamin C. Howard, Attorneys for McCullough Coal Corporation, 1845 Baltimore Trust Building, Baltimore, Md.

[fols. 14-15] *Duly sworn to by Steuart Purcell and Ford C. McCullough. Jurats omitted in printing.*

[fol. 16] PLAINTIFFS' EXHIBIT No. 1

Interstate Commerce Commission

Finance Docket No. 12742

Confluence & Oakland Railroad Company Et Al.
Abandonment

Submitted— Decided—

Recommended that division 4 find that the present and future public convenience and necessity are not shown to permit abandonment by the Confluence & Oakland Railroad Company of its line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., and abandonment of operation thereof by the Baltimore & Ohio Railroad Company, lessee.

W. D. Owens and *E. W. Young* for applicants.
Elliott W. Finkel for U. S. Department of Justice.

Lawrence A. Layton and *W. E. R. Covell* for U. S. War Department in favor of applicant.

J. W. Medford and *H. C. Kearby* for Order of Railroad Telegraphers.

Clarence W. Miles, Walter W. Dawson, Benjamin C. Howard, David S. Custer and *C. O. Ross* for protestants.

Report Proposed by A. E. Nye, Examiner

The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, lessee, jointly applied on January 15, 1940, for permission to the former to abandon, and to the latter to abandon operation of, the branch line of railroad extending from valuation station O minus 13 at Confluence & Oakland Junction, Pa., south to Kendall, Md., approximately 19.79 miles, all in Somerset and Fayette Counties, Pa., and Garrett County, Md. The application is opposed by the Public Service Commission of Maryland. Protests were filed by local interests, and a hearing has been held.

The owning company was formed in 1890 by a consolida- [fol. 17] tion and merger of the Confluence & State Line Railroad and the State Line & Oakland Railway. During the same year, the line was leased for *99* years to the Baltimore & Ohio, the owner of all the outstanding capital stock.

The line operates through a semimountainous section following generally the Youghiogheny River as far as Kendall. There are numerous curves ranging from 6° to 17°, with prevailing grades of 0.8 percent northbound and 1.36 percent southbound. The track is laid with 60 and 67-pound rail, except for about 2.74 miles of 85-pound and larger. No deferred maintenance or need for unusual expenditures has been shown. As of December 31, 1936, the original cost to date of the property, exclusive of land and assessments for public improvements, was $398,875. As of the same date the cost of reproduction less depreciation, and the value of the land and rights therein, are reported by the Commission's Bureau of Valuation to have been $350,074 and $8,717, respectively. The applicants report the net salvage value of the recoverable property to be $25,965.

During the past five years train service has consisted of a mixed train in each direction on Tuesdays and Saturdays, operating from Rochwood, a point on the main line about 10 miles east of Confluence & Oakland Junction, where

the branch connects with the main line of the Baltimore & Ohio. The stations along the line, none of which is served by any other railroad, the population at each, and the approximate distance in miles from the Junction are [fol. 18] Charlestown, Pa., 50, 1; Flanigan, 10, 6; Tub Run, 20, 8; Somerfield, 250, 8; Reason Run, 10, 11; Watson, 26, 12; Geices, Md., 10, 13; Buffalo Run, 10, 14; Selbyport, 100, 15; Friendsville, 600, 17; Kendall, 10, 18. Somerfield and Friendsville are the only agency stations. The total population embraced within an area of 0.5 mile on either side of the line is estimated to be 2,000. Farming is carried on to a limited extent, while lumbering, which flourished at one time, has largely disappeared because of the depletion of standing timber. All coal mines formerly along the line have closed down and been abandoned, except one, located between Friendsville and Kendall. This is the only industry of any importance.

U. S. Highway No. 40 and a paved State highway cross the line at Somerfield and Friendsville, respectively. Improved State Highways also parallel it at a substantial distance on each side. Township roads traverse the area and afford connections with these highways. No common-carrier bus or truck service is operating in the territory except at Friendsville, which is served by a truck line operating from Cumberland, Md. Deliveries are made to all points, however, by local and private trucks from Confluence and Somerfield.

The traffic handled over the line during the years 1934-39, in order, was as follows: Local passengers, 346, 239, 320, 566, 367, 430; interline passengers, 22, 8, 11, 4, 16, 8; carloads of freight handled between stations on the line and beyond (inbound), 502, 195, 222, 201, 196, 134; (outbound), 91, 285, 813, 525, 327, 735; less-than-carload (inbound), [fol. 19] 227, 326, 383, 381, 321, 249 tons; (outbound), 170, 21, 11, 27, 16, 32 tons. No local or bridge freight traffic was handled. During 1934 about 343 carloads of contractors' equipment, supplies and roadbuilding material were handled over the line. Since then the volume of such traffic, presumably used for maintenance purposes, has fluctuated from 49 carloads received in 1935, to 94 in 1938, and 36 in 1939. On the average, 51 carloads of farm products, animals, and fertilizer were received and less than 2 carloads shipped yearly. Inbound coal traffic averaged five cars a year, while outbound shipments were 23,

230, 531, 451, 311, and 725 carloads. Gasoline and oil shipments declined steadily from 98 carloads in 1934 to 30 in 1939, while shipments of forest products declined from 55 to 9 carloads.

The results of operation during the years 1935-39, in order, as shown by the applicants' income statements, were as follows: Revenues, local and assigned portions of interline, (passenger), $87, $52, $64, $70, $63, $67; (milk and miscellaneous), $114, $107, $101, $106, $93, $72; Freight (inbound), $5,221, $2,297, $2,717, $2,054, $2,634, $1,215; (outbound), $637, $2,252, $4,449, $3,690, $2,277, $5,729; system revenues from line traffic, including also minor amounts received by the Alton Railroad and the Staten Island Rapid Transit Railway, passenger, milk and miscellaneous, $380, $298, $279, $262, $390, $395; freight originating on line, $6,240, $20,589, $38,887, $30,561, $20,411, $54,065; destined to points on the line, $29,196, $14,201, [fol. 20] $15,887, $15,373, $14,768, $11,078; totals, $41,875, $39,796, $63,384, $52,116, $40,636, $72,621. Operating expenses, exclusive of overhead charges, were maintenance of way and structures, $6,045, $3,797, $6,226, $9,069, $5,767, $5,738; maintenance of equipment, $1,727, $1,946, $2,242, $2,135, $1,757, $1,965; transportation, $6,308, $6,876, $6,924, $7,067, $7,376, $7,444; taxes, $1,012, $998, $1,116, $1,729, $1,540, $1,627; totals, $15,092, $13,617, $16,508, $20,000, $16,440, $16,774; cost of handling line traffic over other parts of the system, $26,250, $26,084, $40,267, $35,132, $27,719, $48,799; operating losses, $9,033, $8,910, $9,176, $14,080, $11,372, $9,690; system profits from line traffic, $9,567, $9,004, $14,788, $11,054, $7,850, $16,738, which credited to the line would reduce the line losses shown above and show system profits of $533, $95, $5,609, $3,016 (deficit), $3,523, (deficit), and $7,048. Local freight, passenger, milk, and miscellaneous revenues are actually, while those earned in connection with the interline traffic were allocated to the line on a mileage prorate. Maintenance of way and structure expenses are actual, except where an apportionment was made because of overlapping maintenance sections; maintenance of equipment on system car and locomotive-mile basis; transportation expense includes the actual cost of operating stations and trainmen's wages, and a part of the equipment operating charges based on locomotive and car-miles in the different kinds of service. Tax accruals are mainly those assessed against the tangible property

[fol. 21] but also includes gross receipts, capital stock, franchise, and special taxes apportioned on a car-mile basis. Composite operating ratios, exclusive of taxes, based upon the volume of line traffic handled over the Baltimore & Ohio, the Alton Railroad, and the Staten Island Rapid Transit Railway, and ranging from a minimum of 73.14 percent to 77.93 percent, were used in estimating the cost of handling line traffic on other parts of the system.

Pursuant to the provisions of an Act of Congress of June 28, 1938 (52 Stat. 1215), the War Department has selected a point about 1 mile from the north end of the line for the site of a dam across the Youghiogheny River. This unit is one of six that are definitely scheduled for construction, under construction, or completed. Funds for the project have been appropriated by Congress, and allotted by the Secretary of War to carry on the work, which was to begin in April, 1940, and continue for about three years. When at full elevation the reservoir thus created will inundate approximately 15.24 miles of the line from the dam to a point upstream near Friendsville, leaving capable of operation only the section below the dam, which is to remain in service as long as it shall be required by the War Department for the delivery and removal of material and equipment used in the construction work. In the absence of any connection with the applicants' main line or any other railroad, the segment from the high-water mark [fol. 22] to the end of the line will be rendered inoperative. The plans provide for the relocation of all townsites, highways, and facilities subject to inundation. In accordance with the powers granted under the act, including the right to acquire land directly involved, by condemnation if necessary, which according to the evidence will be done if the application herein is not approved, the War Department has elected to exercise its option for the purchase of the affected part of the line for $306,000, subject to the approval of the proposal herein. This option agreement provides that the applicants shall remove all rails, ties, and movable property from the affected area within 90 days after the date of sale or forfeit their right thereto.

The applicants have submitted three estimates showing that the cost of relocating the line would be from $2,018,000 to $2,519,000. The War Department estimates the cost at $2,432,196. The applicants and the War Department insist there is no economic justification for relocating the

line at such expense, in view of the character and volume of traffic handled and the improbability of any improvement in the future.

The McCullough Coal Corporation, hereinafter referred to as the coal company, owner of bituminous coal lands and coal rights, whose mine opening and loading facilities adjoin the right-of-way beyond the flooded area, protests the proposal because it would be deprived of direct rail facilities. The record shows that practically its entire pro- [fol. 23] duction is marketed at nearby eastern points. In case the line is abandoned it would be necessary to use motor trucks between the mine and the nearest railhead at Grantsville, Md., at a cost of about $1.12 a ton. Under these conditions the coal company could not compete with other mines, and would be forced to close down. During the 1921-33 period, coal shipments averaged 27,211 tons annually and 22,386 tons during 1934-39. This latter average is about 722 tons a year more than reported by the applicants. Shipments have fluctuated each year since 1933, when a serious fire curtailed production. During the period 1933-35, shipments averaged about 8,086 tons annually, 29,728 in 1936-37, and 29,037 tons in 1938-39. The large increase in the 1939 tonnage is said by the applicants to result from the suspension of operations in the unionized bituminous coal fields during April and May of that year. This does not accord with the record, however. During 1938 and 1939, total production amounted to 18,972 and 40,102 tons, respectively, while the increased production during the time the strike was in progress amounted to only 8,581 tons over the corresponding period of the previous year.

The coal company contends that in view of the character and volume of traffic handled over the line, it was erroneous for the applicants to use a composite freight and passenger operating ratio to determine the cost of handling line traffic over other parts of the system, and contends that 25 percent [fol. 24] would be fair and reasonable. On this basis, system profits from line operations for 1934-1939 would average about $23,814 a year. At 50 per cent, profits would average $8,548 annually.

The applicants and the War Department contend that the construction of the dam in this instance, even if it is but one of a number of similar units designed to eliminate floods in the lower Monongahela and upper Ohio River

Valleys, creates a public interest greater than the interest of shippers who use the line, and as argued in brief, the application is not being submitted at this time because of deficits in operating the line or in anticipation of future losses, but solely upon the needs of the Federal Government. The authority of the Commission to permit abandonment on the grounds stated is questionable. In *Chicago, M. St. P. & P. R. Co. Trustees Abandonment,* 228 I. C. C. 467, 477, decided July 2, 1938, where it was argued that the abandonment of a branch line would retard, if not prohibit, the carrying-out of a constructive flood-control program, the division said:

> We are confined to the question of public convenience and necessity from a transportation standpoint along, and that would be affected by the flood-control program only to the extent that the applicants would be relieved of the expenses of repairing damage caused by flood waters.

In *Colorado & S. Ry. Co. Abandonment,* 221 I. C. C. 329, 341, decided April 30, 1937, where abandonment was urged to provide for the economical construction of a Federal roadbuilding project, the division said:

> [fol. 25] The bureau's (Public Roads) concern for a proper solution of this problem indicates commendable solicitude for the public interest, but the problem is related to the issue which we are herein called upon to determine, namely, public need for the railroad, only to the extent that the available means of transportation, after substitution of the highway for the railroad, would satisfy the transportation needs of the territory.

In *Motor Bus and Motor Truck Operation,* 140 I. C. C. 685, 737, the Commission said that certificates of public convenience and necessity are required for the purpose of protecting the public interest by excluding unnecessary and wasteful competition and by determining what persons or companies are best able to serve and meet the transportation needs of the public. This public interest to which the Commission must give predominant consideration has been defined by the Supreme Court in numerous cases. In *New York Central S. Corp.* v. *United States,* 287 U. S. 12, decided November 7, 1932, which involved a Commission

order under sections 5(2) and 20a of the Interstate Commerce Act, the court said:

* * * and the term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency and best use of transportation facilities. * * *

In the latter case of *United States* v. *Lowden*, 308 U. S. 225, decided December 4, 1939, which arose under section 5(4) of the act, the court said that

[fol. 26] * * * "public interest" in this section does not refer generally to matters of public concern apart from the public interest in the maintenance of an adequate rail transportation system; that it is used in a more restricted sense defined by reference to the purposes of the Transportation Act of 1920, * * *.

The cases cited are sufficient to demonstrate that the public interest with which the Commission is concerned in this proceeding is limited to that of the necessities and convenience of the shipping and traveling public, and the effect upon such users of transportation, and interstate commerce generally, of the proposed abandonment. Division 4, therefore, should confine its consideration to the evidence relating to the transportation needs of the community served by the line and its value as an artery of interstate commerce. Inasmuch as Congress has directed the War Department how to acquire the land necessary to carry out the program, this Commission should not substitute its authority to accomplish by indirection what can be done directly and in accordance with the law under which the other agency of Government is functioning. The War Department argues on brief that the granting of the application herein will save the tax-paying public the high cost of relocating the line and cites *United States Feldspar Corporation* v. *United States*, 38 Federal 2nd, 91, decided February 12, 1930, where an industry affected by an abandonment authorized by the division in *Fonda, J. & G. R. Co. Abandonment*, 158 I. C. C. 379, decided December 10, [fol. 27] 1929, sought an injunction to prevent flooding the carrier's right-of-way and interrupting train service until the line could be relocated. The carrier had already

received a substantial award from the State, including relocation costs, pursuant to condemnation proceedings, when application for abandonment was filed with this Commission. In deciding the case the division restricted not only the scope of the evidence considered but confined its findings to the transportation features as related to the public convenience and necessity by saying:

> • • • While it is clear from the judgment entered by the court that one of the elements of damage included in the award was the cost of relocating the line, we are required primarily to decide from the evidence only whether the public convenience and necessity permit abandonment of operation between the stations named. (p. 380)
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> • • • • • • • •
>
> In the primary question of public necessity for this line, the financial and legal relations between the applicant and the State should not affect the finding. The evidence not only fails to establish the existence of sufficient need for rail service between Broadalbin Junction and Northville to warrant the continuation thereof, but it also shows that other means of transportation are used and may be extended to meet substantially all requirements. • • • (p. 387)

In the Feldspar case a 3-judge court approved the findings of the Commission, referred to the territory served by the line as having long been dying economically, and found that whatever transportation was necessary could be substantially furnished by motor trucks. The abandonment, therefore, was indirectly approved by the court not because the [fol. 28] land was required by the State for flood-control purposes as implied in brief, but only because there was insufficient traffic to support the line.

Several merchants of Friendsville whose use of the line averages about 40 carloads annually oppose the abandonment mainly because of the detrimental effect upon their business. It appears that much of the merchandise sold by them is delivered by motor trucks, the railroad being used mainly for cement, feed, and other heavy commodities. Representatives of the Borough of Friendsville also testified to the demoralizing effect the loss of the railroad would have on the economic life of the community. The Commis-

sion has repeatedly said that matters such as these are not of controlling importance.

The benefits accruing to the public from continued rail transportation service, the present and prospective needs of the public for such service commensurate with its ability to support a railroad, and the loss and inconvenience resulting from abandonment, must be weighed against the disabilities under which the applicants conduct their business. There is no evidence that the operation of the line has burdened the system in the past. The testimony shows that the present volume of traffic is expected to continue indefinitely. Under these circumstances there is no justification for authorizing abandonment of the line at this time.

It is recommended that division 4 find that the present and future public convenience and necessity are not shown [fol. 29] to permit abandonment by The Confluence and Oakland Railroad Company, and abandonment of operation by The Baltimore and Ohio Railroad Company, lessee, of the branch line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., described in the application. An appropriate order should be entered.

[fol. 30] PLAINTIFFS' EXHIBIT No. 2

Interstate Commerce Commission

Finance Docket No. 12742

CONFLUENCE & OAKLAND RAILROAD COMPANY ET AL.
ABANDONMENT

Submitted January 16, 1941. Decided March 6, 1941

Certificate issued permitting abandonment by the Confluence & Oakland Railroad Company of a line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., and abandonment of operation thereof by the Baltimore & Ohio Railroad Company, lessee.

W. D. Owens and *E. W. Young* for applicants.
Elliott W. Finkel for United States Department of Justice.
Lawrence A. Layton and *W. E. R. Covell* for United States War Department in favor of application.

J. W. Medford and *H. C. Kearby* for Order of Railroad Employees' organization.

Clarence W. Miles, Walter W. Dawson, Benjamin C. Howard, David S. Custer, and *C. O. Ross* for protestants.

Report of the Commission

Division 4, Commissioners Porter, Mahaffie, and Miller

By Division 4:

Exceptions to the report proposed by the examiner were filed, and the case has been orally argued.

The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, lessee, jointly applied on January 15, 1940, for permission to the former to abandon, and to the latter to abandon operation of, a line of railroad extending from valuation station 0 minus 13 at Confluence & Oakland Junction, Pa., south to Kendall, Md., approximately 19.79 miles, all in Somerset and Fayette Counties, Pa., and Garrett County, Md. The application is opposed by the Public Service Commission of Maryland. Protests were filed by local interests, and a hearing has been held. All points mentioned herein are in Maryland unless otherwise stated.

The Confluence & Oakland was formed in 1890 by a consolidation and merger of the Confluence & State Line Railroad and the State Line & Oakland Railway. During the same year the entire property was leased for 999 years to the Baltimore & Ohio, the owner of all the outstanding capital stock.

The line operates through a semimountainous section of southwestern Pennsylvania and western Maryland, following generally the Youghiogheny River as far as Kendall. There are numerous curves ranging from 6° to 17°, with prevailing grades of 0.8 percent northbound and 1.36 percent southbound. The track is laid with 60-pound and 67-[fol. 31] pound rail, except for about 2.74 miles of 85-pound and larger. No deferred maintenance or need for extraordinary expenditures has been shown. The Confluence & Oakland owns no equipment. As of December 31, 1936, the original cost to date of the property, exclusive of land and assessments for public improvements, was $398,873. As of the same date the cost of reproduction less depreciation and the value of about 124 acres of land and rights in

private land were reported by our Bureau of Valuation to have been $350,074 and $8,717, respectively. The applicants report the net salvage value of the recoverable property to be $25,965.

During the past five years train service has consisted of a mixed train in each direction on Tuesdays and Saturdays, operating from Rockwood, a point on the main line about 10 miles east of Confluence & Oakland Junction, where the line connects with the main line of the Baltimore & Ohio. The stations along the line, none of which is served by any other railroad, the population at each, and the approximate distance in miles from the junction are: Charlestown, Pa., 50, 1; Flanigan, 10, 6; Tub Run, 20, 8; Somerfield, 250, 8; Reason Run, 10, 11; Watson, 25, 12; Geices, Md. 10, 13; Buffalo Run, 10, 14; Selbyport, 100, 15; Friendsville, 600, 17; Kendall, 10, 18. Somerfield and Friendsville are the only agency stations. The total population embraced within an area of 0.5 mile on both sides of the line is estimated to be 2,000. Farming is carried on to a limited extent, while lumbering, which flourished at one time, has largely disappeared because of the depletion of standing timber. All coal mines formerly along the line have closed down and been abandoned except one, which is located between Friendsville and Kendall. This is the only industry of any importance.

U. S. Highway 40 and a paved State highway cross the line at Somerfield and Friendsville, respectively. Improved State highways also parallel it at a substantial distance on each side. Secondary roads traverse the area and afford connections with these highways. No common-carrier bus or truck service operates in the immediate territory except at Friendsville, which is served by a truck line operating from Cumberland. Deliveries are made to all points, however, by local and private trucks operating mainly out of Confluence and Somerfield.

The traffic handled over the line during the years 1934-39, in order, was as follows: Local passengers, 346, 239, 320, 566, 367, 430; interline passengers, 22, 8, 11, 4, 16, 8; carloads of freight handled between stations on the line and off-line points, inbound, 502, 195, 222, 201, 196, 134; outbound, 91, 285, 613, 525, 327, 735; less-than-carload, inbound, 227, 326, 383, 381, 321, 249 tons; outbound, 170, 21, 11, 27, 16, 32 tons. No local or bridge freight traffic was handled. During 1934 about 343 carloads of contractors' equipment,

supplies, and road-building material were handled over the line. Since then the volume of such traffic, presumably used for maintenance purposes, has fluctuated from 49 carloads received in 1935 to 94 in 1938 and 36 in 1939. An average of 51 carloads of farm products, animals, and [fol. 32] fertilizer were received and less than 2 carloads shipped yearly. Inbound coal traffic averaged 5 cars a year, while outbound shipments each year, 1934-1939, in order, were 23, 230, 531, 451, 311, and 725 carloads. Incoming gasoline and oil shipments declined steadily from 98 carloads in 1934 to 30 in 1939, while shipments of forest products declined from 55 to 9 carloads.

The results of line operation during the years 1935-39, in order, as shown by the applicant's income statements, were as follows: Revenues, local and assigned portions of interline, passenger, $87, $52, $64, $70, $63, $67; milk and miscellaneous, $114, $107, $101, $106, $93, $72; freight, inbound, $5,221, $2,297, $2,717, $2,054, $2,634, $1,215; outbound, $637, $2,252, $4,449, $3,690, $2,277, $5,729; system revenues from line traffic, including also minor amounts received by the Alton Railroad and the Staten Island Rapid Transit Railway, passenger, milk, and miscellaneous, $380, $298, $279, $262, $390, $395; freight originating on line, $6,240, $20,589, $38,887, $30,561, $20,411, $54,065; destined to points on the line, $29,196, $14,201, $15,887, $15,373, $14,768, $11,078; totals, $41,875, $39,796, $62,384, $52,116, $40,636, $72,621. Operating expenses, exclusive of overhead charges, were maintenance of way and structures, $6,045, $3,797, $6,226, $9,069, $5,767, $5,738; maintenance of equipment, $1,727, $1,946, $2,242, $2,135, $1,757, $1,965; transportation, $6,308, $6,876, $6,924, $7,067, $7,376, $7,444; railway tax accruals, $1,012, $998, $1,116, $1,729, $1,540, $1,627, totals, $15,092, $13,617, $16,508, $20,000, $16,440, $16,774; cost of handling line traffic over other parts of the system, using composite operating ratios, exclusive of taxes, ranging from 73.14 percent to 77.93 percent, and based upon the volume of line traffic handled over the Baltimore & Ohio and subsidiaries, the Alton Railroad, and the Staten Island Rapid Transit Railway, but influenced mainly by the former, $26,250, $26,084, $40,267, $35,132, $27,719, $48,799; losses as an independent line operation, $9,033, $8,910, $9,176, $14,080, $11,372, $9,690; system profits from line traffic, $9,567, $9,004, $14,788, $11,064, $7,850, $16,738, which, offsetting the line deficits shown above, result in profits of

$533, $95, $5,612, $3,016 (loss) $3,523 (loss), and $7,048. Local freight, passenger, milk, and miscellaneous revenues are actual, while a portion of the interline revenue was allocated to the line of a mileage prorate. Expenses of maintenance of way and structure are actual, except where an apportionment was made because of overlapping maintenance sections. Maintenance of equipment was divided on System car-mile or locomotive-mile bases. Transportation expense includes the actual cost of operating stations on the line, and trainmen's wages and part of the equipment operating costs were divided according to locomotive-miles and car-miles operated in the different kinds of service. Tax accruals are mainly those assessed against tangible property, but also include gross-receipts, capital-stock, franchise, and special taxes apportioned on a car-mile basis. Assuming that the system cost of handling traffic originating on or destined to points on the line amounted to 50 percent of the revenues therefrom, the system profits from such traffic during each of the periods referred to would have [fol. 33] been $17,908, $17,544, $27,527, $23,098, $17,764, and $32,769, which, when offset by losses directly attributed to line operations, would result in net system profits of $8,875, $8,634, $18,351, $9,018, $6,412, and $23,079. Using a 25-percent operating factor claimed by the protestants to be more representative of the actual cost of handling line traffic over other parts of the system, the profit to the system for the same periods would have been $17,830, $17,406, $32,115, $20,567, $15,304, and $39,463.

Pursuant to the provisions of an act of Congress of June 28, 1938 (52 Stat. 1215), the War Department has selected a point on the line about 1 mile from Confluence, for the site of a dam across the Youghiogheny River. This unit is one of six that are scheduled for construction, are under construction, or have been completed. Funds for the project have been appropriated by Congress, and also allotted by the Secretary of War to carry on the work, which was to begin in April 1940 and continue for about 3 years. When at full elevation the reservoir thus created will inundate approximately 12 miles of the line from the dam site to a point upstream near Friendsville, leaving available for operation only the 1-mile section below the dam, which is to remain in service so long as it shall be required by the War Department for the delivery and removal of material and equipment used in the construction work. In the ab-

sence of any connection with the applicants' main line or any other railroad, the detached 6-mile segment from the high-water mark south to the end of the line will be rendered inoperative. Plans provide for the relocation of all townsites, highways, and other public facilities that will be inundated. In accordance with the powers granted under the act, including the right to acquire land directly involved by condemnation if necessary, which according to the evidence will be done if the application herein is not approved, the War Department has elected to exercise its option for the purchase of the affected part of the line for $306,000, subject to the approval of the application herein. This option agreement provides that the applicants shall remove all rails, ties, and moveable property from the affected area within 90 days after abandonment or forfeit their right thereto.

The applicants and the War Department have submitted four estimates showing that the cost of relocating the line would range from $2,018,000 to $2,519,000, or about $100,000 a mile. These estimates are in considerable detail and show specific routes and definite quantities and unit prices for the different kinds of construction involved. The principal protestant contends that these estimates are exorbitant because of the high unit prices used for land and material, and contemplate a type of construction not warranted by the amount of traffic handled or by the construction standards prevailing on the present line. An engineering witness for the protestant testified that a relocated line sufficient to carry the present traffic could be constructed for about $800,000 or possibly less. The applicants and the War Department assert that there is no economic justification for relocating the line at such a high cost to the taxpayers in the light of the present condition of business and the uncertainty of potential traffic, while the protestants con- [fol. 34] tend that, under the law, the War Department must relocate the line regardless of cost. We are not convinced of the accuracy of any of these estimates. It was also shown by the applicants that a new line built according to any of the estimates would require not only normal maintenance expenditures totaling about $8,000 annually in excess of the cost to maintain the present road, but would also necessitate an additional expense of about $8,000 a year over a period of 5 years while the line is undergoing

seasoning. The protestants' estimated maintenance expenditures for the line would be even higher.

The McCullough Coal Corporation, hereinafter referred to as the coal company, owner of bituminous-coal lands and rights, whose mine opening and loading facilities adjoin the right-of-way beyond the flooded area, protests the proposal because it would be deprived of direct rail connections. The record shows that practically the company's entire production is shipped by rail to nearby eastern points. In case the line is abandoned it would be necessary to use motortrucks between the mine and the nearest railhead at Grantsville, at a cost of about $1.12 a ton. Under such circumstances, the mine would be forced to close down because of inability to compete with other mines more favorably located. Trucks are used now for local deliveries only. Coal shipments averaged 27,211 tons annually during the 1921-33 period and 22,386 tons during 1934-39. This latter average is about 994 tons a year more than the outbound shipments reported by the applicants. Shipments have fluctuated each year since 1933, when a serious fire curtailed production. Shipments averaged about 9,086 tons annually during the period 1933-35, 27,728 tons in 1936-37. In 1938 the volume handled was 17,632 tons, and in 1939, 40,243 tons. The large increase in the 1939 tonnage is claimed by the applicants to result from a suspension of operations in the unionized bituminous-coal fields during April and May of that year.

The coal company contends that, in view of the kind of service furnished by the line and the volume of traffic handled, it was erroneous for the applicants to use a system composite operating ratio to determine the cost of handling line traffic over other parts of the system, and also contends that 25 per cent would be fair and reasonable. On the latter basis, system profits from line operations for the 1934-39 period would average about $23,781 yearly. Through the use of a 50-per cent factor, frequently used in cases of this character, profits would average about $12,395 annually. The returns filed by the applicants show an average annual profit of $1,125.

The coal company argues on brief that we cannot lawfully concern ourselves with the interests of those who in this instance will benefit by the construction of the flood-control project, but must confine our consideration to the interests of the transportation public, or promotion and

protection of interstate commerce. The authorities cited in support of that contention appear in the footnote below.[1] [fol. 35] The applicants and the War Department contend that the installation of the reservoir at the site selected, even if it is but one of a number of similar units designed to eliminate floods in the lower Monongahela and upper Ohio River Valleys, creates a public interest greater than the interest of shippers who use the line, and that the application was not submitted because of operating deficits or in anticipation of future losses, but solely to meet the needs of the Federal Government.

Among the numerous cases cited on brief by the War Department are *Transit Commission* v. *United States*, 284 U. S. 360, and *United States Feldspar Corporation* v. *United States*, 38 Fed. (2d) 91. We observe, however, that in most of these cases abandonment was authorized by us because revenues from the traffic handled over the railroad proposed to be abandoned were insufficient to meet ordinary operating expenses and the cost of improvements ordered by the public authorities.

Although the record herein does not contain any evidence showing the cost of repairing flood damage to those segments of the Baltimore & Ohio lying in the lower Monongahela and upper Ohio River Valleys, it is a matter of common knowledge that these catastrophies, which not only menace the safety of train operation but increase the cost of operations because of property destruction and suspension of train service, have occurred at varying intervals during the past, and in all probability will occur in the future until the flood-control project now under construction by the War Department is completed. It follows that the project when completed will, in many ways, not only benefit the general public but also the railroads that have been injured in the past.

The record shows that within 1 year the construction of the dam will have reached the point where appropriation

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[1] Sharfman "The Interstate Commerce Commission", Vol. II, page 264; *Colorado* v. *United States*, 271 U. S. 153; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12; *Texas* v. *United States*, 292 U. S. 522; *Schechter* v. *United States*, 295 U. S. 495; *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204; New England Divisions Case, 261 U. S. 184.

of the carrier land will be necessary. The railroad must then cease operations. Whether a substitute line should be provided, regardless of whether the cost of relocating is paid by the applicants or by the War Department, is doubtful in the light of the traffic handled during the past 6 years and what may be handled in the future. Even at the low operating cost urged by the coal company the net system profits annually since 1934 would not have been sufficient to produce a reasonable return upon an investment as low as $800,000. The inclusion of the estimated increase in maintenance costs would diminish the rate of return still more. We are of the opinion that the same consideration must be given to the proposed expenditure of public funds for relocating the line that would be given if the railroad were to bear the expense. If public funds are to be used to protect the coal company from loss caused as a result of the national flood-control program this should be done directly and not by means of uneconomic expenditures in railroad construction and maintenance.

Several merchants of Friendsville, whose use of the line averages about 40 carloads of freight annually, oppose the abandonment mainly because of the detrimental effect upon their business. It appears that much of the merchan- [fol. 36] dise handled by them is received and delivered by motortrucks, the railroad being used mainly for cement, feed, and other heavy commodities. Representatives of the Borough of Friendsville also testified to the demoralizing effect the loss of the railroad would have on the economic life of the community. We have heretofore held that matters of the kind last mentioned are not of controlling importance in cases of this character.

The benefits accruing to the public from continued rail transportation service, and the present and prospective needs of the public for such service commensurate with its ability to support a railroad, must be weighed against the loss and inconvenience which might be imposed upon interstate commerce. There is no evidence that the line involved herein has heretofore been a burden on the system or that the volume of traffic last reported would not continue to support it in the future if it remained undisturbed. However, the further existence of this line of railway is not possible in view of the need of the land for flood control, and it must give way to a superior public use. If the railroad service now being performed is to be continued

the line must be relocated. Considering the expenditure necessarily incident to that relocation and the increased costs of operating the line that will be caused thereby, we conclude that we are not justified by the public convenience and necessity in taking action herein that will require the relocation of the line.

We find that the present and future public convenience and necessity permit abandonment by The Confluence and Oakland Railroad Company, and abandonment of operation by The Baltimore and Ohio Railroad Company, lessee, of the branch line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., described in the application. An appropriate certificate will be issued, effective from and after 40 days from its date, in which suitable provisions will be made for the cancelation of tariffs.

MILLER, *Commissioner*, concurring:

I am in entire accord with the purpose of the flood-control project, involved in this proceeding, because of the beneficial results which will accrue to the general public. However, I am not unmindful of the plight in which the abandonment of the railroad will place the coal company, which operates just beyond the area to be flooded and is dependent solely upon railroad service for its continued existence. It would seem, as indicated in the report, that under the circumstances here existing, equitable relief, to which I believe the coal company to be entitled, should be given directly because relocation of the tracks is not justified.

[fol. 37] CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 6th day of March, A. D. 1941

Finance Docket No. 12742

CONFLUENCE & OAKLAND RAILROAD COMPANY ET AL.
ABANDONMENT

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said division having, on the date hereof, made and

filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity permit abandonment by The Confluence and Oakland Railroad Company and abandonment of operation by The Baltimore and Ohio Railroad Company of the line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., described in the report aforesaid.

It is ordered, That this certificate shall take effect and be in force from and after 40 days from its date. Tariffs applicable on said line of railroad may be canceled upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That The Baltimore and Ohio Railroad Company, when filing schedules canceling tariffs applicable on said line of railroad, shall in such schedules refer to this certificate by title, date, and docket number.

And it is further ordered, That The Baltimore and Ohio Railroad Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

[fol. 38] PLAINTIFFS EXHIBIT No. 3

Certificate of Public Convenience and Necessity

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 6th day of March, A. D. 1941

Finance Docket No. 12742

Confluence & Oakland Railroad Company et al. Abandonment

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions

thereon, which report is hereby referred to and made a part hereof:

It is hereby certified. That the present and future public convenience and necessity permit abandonment by The Confluence and Oakland Railroad Company and abandonment of operation by The Baltimore and Ohio Railroad Company of the line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., described in the report aforesaid.

It is ordered. That this certificate shall take effect, and be in force from and after 40 days from its date. Tariffs applicable on said line of railroad may be canceled upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered. That The Baltimore and Ohio Railroad Company, when filing schedules canceling tariffs applicable on said line of railroad, shall in such schedules refer to this certificate by title, date, and docket number.

And it is further ordered. That The Baltimore and Ohio Railroad Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

By the Commission, division 4.

(Seal.) W. P. Bartel, Secretary.

[fol. 39] PLAINTIFFS' EXHIBIT No. 4

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 12742

Confluence & Oakland Railroad Company et al. Abandonment

Submitted July 10, 1941. Decided July 31, 1941.

Findings of division 4 that the present and future public convenience and necessity permit abandonment by the Confluence & Oakland Railroad Company of a line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., and abandonment of operation thereof by the Baltimore & Ohio Railroad Company, lessee, affirmed. Previous report 244 I. C. C. 451.

John E. Evans for applicants.
Elliott W. Finkel for United States of America.
Clarence W. Miles for protestants.

Report of The Commission on Reargument

By The Commission:

By report and certificate in this proceeding dated March 6, 1941, 244 I. C. C. 451, division 4 permitted The Confluence and Oakland Railroad Company to abandon, and The Baltimore and Ohio Railroad Company, lessee, to abandon the operation of a line of railroad extending from Confluence & Oakland Junction, Pa., south to Kendall, Md., approximately 19.79 miles, in Somerset and Fayette Counties, Pa., and Garrett County, Md. The case is now before us upon petition of the protestants, the McCullough Coal Corporation and the Public Service Commission of Maryland for reconsideration. Argument has been held pursuant to our order of June 2, 1941, reopening the case.

The following is a brief summary of the facts which are set forth in detail in the previous report.

[fol. 40] The line involved is located in the south central part of Pennsylvania and Western Maryland. Practically all the traffic handled is coal which moves from the mine of the McCullough Coal Corporation. Revenues from line operations have averaged about $51,571 annually since 1934, the largest revenue accruing during 1939, the latest year for which data are available. Actual and estimated operating expenses, the latter determined by the use of operating ratios ranging from 73 to about 78 percent, averaged $50,447, on which basis the average annual system profit was $1,125. Substituting 50 percent and 25 percent for these operating ratios, which the protestant alleges are more representative of the fair cost of handling line traffic over other parts of the system, the average annual profits from line operations would have been about $12,395 and $23,781, respectively.

The War Department is constructing a series of impounding dams throughout Pennsylvania to control water flowage in certain tributaries of the Ohio and Monongahela Rivers and thus to eliminate floods in the valleys of those streams. One of these structures is to be built in the valley of the Youghiogheny River, which structure, when com-

pleted, will create an artificial lake that will inundate about 12 miles of the line here under consideration. Although the petitioner's coal properties are situated above high-water mark, the interruption of line operations will deprive it of a rail outlet. The Flood Control Act, as amended, among other things, authorizes the Secretary of War to expend public funds to acquire title to all lands, easements, and rights-of-way; to relocate highways, railways, and utilities, and to reimburse those from whom property or rights therein are taken. No reimbursement is to be made [fol. 41] however for indirect or speculative damage. Instead of building a new line which, according to present day specifications is estimated by the applicant and the War Department to cost between $2,000,000 and $2,500,000, and requiring abnormal maintenance expenses amounting to $8,000 annually while the track structure is undergoing seasoning, the War Department holds an option to purchase that portion of the line actually required for reservior purposes for $306,000, the vendor to retain ownership in all property severable from the realty. The exercise of this option is conditioned upon obtaining our permission to abandon the line. The coal company estimates that the cost of duplicating the present line in another location would not exceed $800,000.

The War Department contends on brief and argument as sufficient reasons for the proposed abandonment, the high cost of relocation; the reasonableness of the proposed purchase price; the comparatively low value of the property of the coal company; the uncertainty of its economic value to the community; the slight extent to which it would be affected by discontinuance of the line; the uncertainty of the volume of business furnished to the line; and the superior use to be made of the railroad property by the Federal Government. The petitioners deny most of these contentions and the coal company states it will furnish sufficient coal tonnage in the future to permit of profitable operation of the line, and contends that the public convenience and necessity, which we are called upon to determine, require that if the proposed project is carried to completion, the line must be relocated.

In the previous report division 4 said:

[fol. 42] The benefits accruing to the public from continued rail transportation service, and the present and pro-

spective needs of the public for such service commensurate with its ability to support a railroad, must be weighed against the loss and inconvenience which might be imposed upon interstate commerce. There is no evidence that the line involved herein has heretofore been a burden on the system or that the volume of traffic last reported would not continue to support it in the future if it remained undisturbed. However, the further existence of this line of railway is not possible in view of the need of the land for flood control, and it must give way to a superior public use. If the railroad service now being performed is to be continued the line must be relocated. Considering the expenditure necessarily incident to that relocation and the increased costs of operating the line that will be caused thereby, we conclude that we are not justified by the public convenience and necessity in taking action herein that will require the relocation of the line.

The question presented to us is whether we should consider the broader interest of the general public in the proposed abandonment and the things that give rise to it, or confine ourselves, as contended by the petitioner, to a consideration of that interest which relates solely to the transportation public concerned with the facilities of the line of railroad involved herein and its relationship to interstate commerce generally.

On brief and at the argument counsel for the petitioner refers to decisions of the United States Supreme Court dealing not only with the general purposes of the Interstate Commerce Act but with our specific powers such as permitting abandonments in proper cases and establishing the criteria by which those powers must be exercised. It is not disputed that the flood-control program, of which the taking of the applicants' property is but a small part, will eventually benefit large numbers of persons, and including railroads, who, in the past, have suffered from the ravages of uncontrolled waters; that only a comparatively minor interest will be adversely affected by abandonment; that the [fol. 43] purchase price to be paid by the Government is reasonable; and that the future of the line concerning traffic and profits therefrom is uncertain. In view of these facts, we conclude that the petitioner's contention is untenable, and that we are not restricted in our deliberations to the considerations indicated by the petitioner. Congress delegated to us the authority to ascertain the facts

in these cases and to exercise thereon a judgment whether abandonment would be consistent with the public convenience and necessity. *Colorado* v. *United States* 271 U. S. 153. That we may consider the cost of future operations and improvements in arriving at such a determination is apparent from the decision of the same court in *Transit Commission* v. *U. S.* 284 U. S. 360. The War Department cites cases in support of the contention that because of present traffic conditions and the improbability of any increase in the future, the taxpayers should be spared the burden of paying for relocating the line and the railroad the expensive cost of future maintenance.

We are not unmindful of the plight in which the coal company will be, when service on the line is terminated, but similar cases in varying degrees are to be found in most contested abandonment cases. It is unfortunate that the law, as construed by the War Department will not permit compensation being paid for the loss of the coal company's business that is certain to follow unless the line is restored at another location. Our duty, however, lies not in determining the property rights of shippers who happen to be discommoded or forced out of business, but as stated in the previous report, to weigh the present and prospective need for the line and the benefits accuring to the public therefrom, against the burdens, present or prospective, that might be imposed upon interstate commerce.

[fol. 44] From a consideration of the entire record in this proceeding we find that the present and future public convenience and necessity permit abandonment of the line described herein. It follows therefore that the decision of division 4 must be, and it is hereby, affirmed.

EASTMAN, *Chairman*, dissenting:

We have here a line of railroad which, it is conceded, has been operated at a profit in the past, and there is nothing of record to indicate that it cannot continue to be operated at a profit, if allowed to remain where it now is. The question before us arises under section 1 (18) of the Interstate Commerce Act, and is whether the present or future public convenience and necessity permit the abandonment of this line of railroad. Except for one thing, there could be only one possible answer to this question, and that answer would

be "No". The single circumstance which, it is contended, justifies changing this answer to "Yes" is that the United States Government is about to build a dam which will inundate a large part of the line. It will not, however, inundate its principal source of traffic, which is a coal mine. If the line is abandoned, the mine will have no rail outlet and cannot continue to operate. It will not be under water, but that fact will afford no financial consolation. If we find that public convenience and necessity permit the abandonment, the Government has an agreement to buy that part of the line which will be inundated for $306,000, which is a figure based on the capitalized earnings of the entire line, both the part which will be and the part which will not be under water. The Government does not, however, propose to pay a cent to the owners of the coal mine, on the ground that it lacks statutory authority to compensate for "indirect or speculative damage".

[fol. 45] It is alleged, and no one disputes the fact, that the dam will be part of an extensive flood-control program which will result in much general public benefit, and that the lessee of the line, the Baltimore & Ohio Railroad Company, will share in this benefit. It is urged, therefore, that in determining whether public convenience and necessity permit the abandonment of the line, we should include in our consideration of the matter this general public benefit. There are, as I see it, two answers to this argument.

In the first place, it is clear that authority from us to abandon the line is not a prerequisite to the building of the dam. It will be built, whether or not we grant such authority. The only difference is that if we grant, it will not be necessary for the Government to exercise the power of eminent domain, whereas, if we do not grant, it will be necessary to invoke that power. In the latter event, the Government may be put to greater expense. From the standpoint of the Government and the broader public interest, therefore, all that is involved here is a matter of dollars and cents.

In the second place, our authority under section 1(18) is to determine whether lines of railroad should or should not be abandoned from the standpoint of the public interest as it relates to transportation. The power plainly was given us for the purpose of protecting the public against abandonments which cannot be justified from that stand-

point, and at the same time to lend specific governmental sanction to the abandonment of lines which are shown to be an undue burden upon interstate commerce. As was said in *Colorado* v. *United States*, 271 U. S. 153: "The sole objective of paragraphs 18-20 is the regulation of interstate commerce." And as was said in another connection in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12:

[fol. 46] The provisions now before us were among the additions made by the Transportation Act 1920, and the term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provisions and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred.

Again, in referring to the powers of this Commission in *Schechter* v. *United States*, 296 U. S. 495, the Supreme Court said:

When the Commission is authorized to issue for the construction, extension *or abandonment of lines, a certificate of "public convenience and necessity"*, or to permit the acquisition by one carrier of the control of another, if that is found to be "in the public interest", we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and *can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation.* (Emphasis supplied.)

This Commission has no authority to go outside the field of transportation and pass judgment upon the question whether lines of railroad which are not an undue burden upon interstate commerce should be abandoned because a superior public interest demands that they make way for a public improvement such as the flood-control program here involved. Other statutes which we do not administer provide for a determination of that question in an orderly manner and in accordance with the rules which relate to such determinations.

The United States Government has such a statutory remedy, so far as the building of this dam is concerned, and should proceed with it. In the present proceeding we have no evidence before us which warrants the conclusion that public convenience and necessity permit the abandonment of this line from the standpoint of the public interest in transportation which it is our duty, and our only duty, [fol. 47] to protect. If the Government should pursue its statutory remedy and take a large part of this line by right of eminent domain, it would then be our duty to determine whether the present or future public convenience and necessity require its reconstruction, at possibly great expense, upon a new location; but that question is not before us now.

It is quite possible that in that event another way of settling the matter with justice to all concerned would, or could, be found. As stated above, the railroad is willing to settle for $306,000. The other substantial interest involved is that of the coal mine which is the source of most of the present profitable traffic. The representatives of the Government have stated to us on brief and argument that this mine is of comparatively low value, and, as I understand it, its owners claim a value only slightly in excess of the amount which is to be paid for the railroad. This being the situation, it should be possible, by the aid of further legislation if necessary, to arrive at a reasonable settlement with the owners of the mine which will remove any demand for relocation of the line; and certainly justice demands that they be compensated for the loss which they will suffer upon the abandonment of a railroad which they have enabled, and are prepared to continue to enable, to operate at a profit.

For the reasons stated, I would deny the application.

I am authorized to state that Commissioners Rogers and Patterson join in this expression.

Commissioner Aitchison did not participate in the disposition of this case.

By the Commission.

W. P. Bartel, Secretary. (Seal)

[fol. 48] PLAINTIFFS' EXHIBIT No. 5

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 2nd day of September, A. D. 1941.

Finance Docket No. 12742

CONFLUENCE & OAKLAND RAILROAD COMPANY ET AL., ABANDONMENT

ORDER

Upon further consideration of the record in the above-entitled proceeding, of the report and certificate of Division 4 dated March 6, 1941, and the report of the Commission dated July 31, 1941:

It is ordered, That the findings of Division 4 that the present and future public convenience and necessity permit abandonment by the Confluence & Oakland Railroad Company of a line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., and abandonment of operation thereof by the Baltimore & Ohio Railroad Company, lessee, be, and they are hereby, affirmed.

It is further ordered, That the certificate issued by Division 4 on March 6, 1941, shall become effective from and after 15 days from the date hereof.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 49] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION

Now comes the Interstate Commerce Commission, intervening defendant, and in answer to the bill of complaint filed in this case respectfully represents:

I

The averments of division "First" of the bill of complaint are admitted except that it is denied that the plaintiffs were

adversely affected or legally injured by the order and certificate of the Commission entered on September 2, 1941.

II

The averments of division "Second" of the bill of complaint are admitted.

[fol. 50]

III

The averments of division "Third" of the bill of complaint are admitted.

IV

The averments of division "Fourth" of the bill of complaint are denied except insofar as they accord with and appear in the reports of the Interstate Commerce Commission of March 6 and July 31, 1941.

V

The averments of division "Fifth" of the bill of complaint are denied except insofar as they accord with and appear in the reports of the Interstate Commerce Commission of March 6 and July 31, 1941.

VI

The averments of division "Sixth" of the bill of complaint are denied except insofar as they accord with and appear in the reports of the Interstate Commerce Commission of March 6 and July 31, 1941.

VII

The averments of division "Seventh" of the bill of complaint are admitted, but it is denied that the averment with respect to the filing of a proposed report by Examiner A. G. Nye on or about November 5, 1940, and the contents of said report, are material to any issue before this court.

VIII

The averments contained in division "Eighth" of the bill of complaint are denied.

IX

In further answer to the allegations of the bill of complaint, it is averred that said reports and orders of the

Commission in the proceeding before it, attached to and [fol. 51] made a part of the bill of complaint as Exhibits 1 to 5, inclusive, were not made or entered either arbitrarily or contrary to the relevant evidence or the law or without evidence to support them; that in making said reports and orders the Commission did not exceed the authority which had been duly conferred upon it by law, and the Commission denies each of and all the allegations to the contrary contained in said bill of complaint, and except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the complaint insofar as they conflict either with the allegations herein or with the statements contained in said reports of March 6 and July 31, 1941.

All of which matters and things the Commission is ready to maintain and prove.

Wherefore the Commission prays that the complaint herein be dismissed.

Interstate Commerce Commission. By Daniel H. Kunkel, Attorney. Daniel W. Knowlton, Chief Counsel, Of Counsel.

[fol. 52] *Duly sworn to by Charles D. Mahaffie. Jurat omitted in printing.*

[fol. 53] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

ANSWER OF THE UNITED STATES OF AMERICA—Filed September 29, 1941

The defendant, United States of America:

1. Admits the allegations of paragraphs 1, 2, 3, and 7 of the bill of complaint, except that it denies that the date of the Flood Control Act of 1938, pursuant to which the War Department acted in commencing the construction of the dam, was July 28, 1938, as alleged in paragraph 7, but alleges that it was in fact June 28, 1938.

2. Denies the allegations of paragraphs 4, 5, and 6, except insofar as the allegations contained therein appear in the reports of the Interstate Commerce Commission of March 6 and July 31, 1941, (Plaintiffs' exhibits Nos. 2 and 4).

3. Denies each and every allegation of paragraph 8, except that it admits the allegation of sub-paragraph 4 that [fol. 54] the line of railroad is now and has been operated at a profit and the allegation of sub-paragraph 7 that if the order of the Commission is not enjoined the railroads will proceed with the proposed abandonment.

Wherefore, it is prayed that plaintiffs' bill of complaint be dismissed.

Robert L. Pierce, Special Attorney, Department of Justice Counsel for the United States. Thurman Arnold, Assistant Attorney General. Frank Coleman, Special Assistant to the Attorney General. Bernard J. Flynn, United States Attorney.

[fol. 55] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

ANSWER OF THE CONFLUENCE AND OAKLAND RAILROAD COMPANY AND THE BALTIMORE AND OHIO RAILROAD COMPANY—Filed September 29, 1941

The Defendants, the Confluence and Oakland Railroad Company and the Baltimore and Ohio Railroad Company, hereby join in the Answer of the United States of America to the complaint filed in the above stated proceeding, and adopt the admissions and averments, therein.

John E. Evans, Sr., Special Counsel for the Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, Defendants. Charles R. Webber, General Attorney of the Baltimore and Ohio Railroad Company and the Confluence and Oakland Railroad Company.

[fol. 56] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

No. 1378 Civil Action

STEUART PURCELL, EDMUND H. BUDNITZ and ARTHUR H. BRICE, Constituting the Public Service Commission of Maryland, and McCullough Coal Corporation, a Maryland Corporation, Plaintiffs,

versus

THE UNITED STATES OF AMERICA, THE CONFLUENCE AND OAKLAND RAILROAD COMPANY and The Baltimore and Ohio Railroad Company, Defendants

(Argued October 1, 1941)

Before Soper, Circuit Judge, and William C. Coleman and Way, District Judges

Joseph Sherbow for the Public Service Commission; Miles and O'Brien (by Clarence W. Miles and Benjamin C. Howard) for McCullough Coal Company; Bernard J. Flynn, United States Attorney, Robert L. Pierce and Elliott Finkel for the United States; Charles R. Webber and John E. Evans for the Baltimore and Ohio Railroad Company and the Confluence and Oakland Railroad Company; and D. H. Kunkel for the Interstate Commerce Commission.

OPINION—Filed October 13, 1941

SOPER, Circuit Judge:

This suit is instituted under the provisions of the Act of Congress of October 22, 1913, as amended, (28 U. S. C. A. 41 (28), 43-45, 45A-46, 47, 48), to enjoin the operation and effect of an order of the Interstate Commerce Commission dated September 2, 1941, whereby the abandonment of a line of railroad extending 19.79 miles from Confluence and Oakland Junction, Pennsylvania, to Kendall, Maryland, was authorized. The plaintiffs in the suit are the Public Service Commission of Maryland and the McCullough Coal Corporation, a Maryland corporation, which owns a coal mine in Maryland that will be adversely affected if the line of railroad is discontinued. The defendants are the United

States and the Confluence and Oakland Railroad Company, [fol. 57] a railroad corporation under the laws of Maryland and Pennsylvania, which owns the line of railroad in question, and the Baltimore and Ohio Railroad Company, a Maryland corporation, which operates the railroad as lessee. The Confluence and Oakland Railroad Company is a totally owned subsidiary of the Baltimore and Ohio Railroad Company.

Application was made by the carriers to the Interstate Commerce Commission, under Section 1 (18) of the Interstate Commerce Act, 49 U. S. C. A. 1 (18), for a certificate that the present and future public convenience and necessity permit the abandonment and removal of the line. The reasons given for the proposal were that the United States, acting through the War Department, proposes to construct a flood control dam on the Youghiogheny River about three miles above Confluence, Pennsylvania, which will require the abandonment of the railroad's entire line because it will be submerged for a distance of approximately 12 of its 19.79 miles, and the remainder of the line will become a detached segment without rail connection with any other railroad and will thus become valueless; and that the relocation of the line would require an expenditure that is not justified by the present and prospective revenues of the line, and would constitute an undue burden on interstate commerce without compensating advantage. The application also showed that the carriers had given an option to the United States for a period of 365 days to purchase the railroad for $306,000, (the Railroad Company reserving the right to salvage and remove the rail and other material), subject to the approval and authorization by the Commission of the abandonment of the line. Testimony was taken before an examiner and before Division 4 of the Commission, which found for the carriers in a report of March 6, 1941. Thereupon the McCullough Coal Corporation and the Public Service Commission of Maryland asked a reconsideration on the ground that there was no substantial evidence to support the issuance of the certificate of abandonment, and that the Interstate Commerce Commission was without jurisdiction to grant it. The matter was then heard by the Commission as a whole, and the decision of Division 4 was affirmed.

The facts as found by Division 4 of the Commission, and approved on reargument by the Commission as a whole,

may be summarized as follows: The railroad runs through a semi mountainous section following generally Youghiogheny River as far as Kendall. As of December 31, 1936 the original cost to date of the property, exclusive of land and of improvement assessments, was $398,873; and the cost [fol. 58] of reproduction less depreciation, and the value of the land, were estimated by the Bureau of Valuation of the Commission to be $350,074 and $8,717 respectively. The carriers estimated the net salvage value of the recoverable property to be $25,965.

During the last five years, train service has consisted of a mixed train in each direction on Tuesdays and Saturdays. The stations along the line are not served by any other railroad. The population, embraced within an area of one-half mile on both sides of the line, is estimated to be 2,000. Farming is carried on to a limited extent. One coal mine, located between Friendsville and Kendall, and operated by the McCullough Coal Corporation, is the only industry of any importance. United States Highway 40 and a paved State highway cross the line at Somerfield and Friendsville, respectively. Improved State highways also parallel it at a substantial distance on each side. Secondary roads traverse the area and afford connections with these highways. No common carrier bus or truck service operates in the immediate territory except at Friendsville, which is served by a truck line operating from Cumberland. Deliveries are made to all points, however, by local and private trucks operating mainly out of Confluence and Somerfield.

The line has been operated at a profit. Setting out the figures with regard to the traffic handled and the revenues received during the years 1934-1939, Division 4 of the Commission found: "Assuming that the system cost of handling traffic originating on or destined to points on the line amounted to 50 per cent of the revenues therefrom, the system profits from such traffic during each of the periods referred to would have been $17,908, $17,544, $27,527, $23,098, $17,764, and $32,769, which, when offset by losses directly attributed to line operations, would result in net system profits of $8,875, $8,634, $18,351, $9,018, $6,412 and $23,079. Using a 25 per-cent operating factor claimed by the protestant to be more representative of the actual cost of handling line traffic over other parts of the system, the profit to the system for the same periods would have been $17,830, $17,406, $32,115, $20,567, $15,304, and $39,463." The report

of the Commission added that if operating ratios ranging from 73 to 78 per cent are used, the average annual profit was $1,125. The final conclusion of the Commission on this aspect of the case was that there was no evidence that the [fol. 59] line involved had theretofore been a burden on the system, or that the volume of traffic last reported would not continue if the line remained undisturbed.

With regard to the business of the McCullough Coal Corporation and the effect upon it of an abandonment of the railroad, the Commission made the following finding:

"The McCullough Coal Corporation, hereinafter referred to as the coal company, owner of bituminous-coal lands and rights, whose mine opening and loading facilities adjoin the right-of-way beyond the flooded area, protests the proposal because it would be deprived of direct rail connections. The record shows that practically the company's entire production is shipped by rail to nearby eastern points. In case the line is abandoned, it would be necessary to use motortrucks between the mine and the nearest railhead at Grantsville, at a cost of about $1.12 a ton. Under such circumstances, the mine would be forced to close down because of inability to compete with other mines more favorably located. Trucks are used now for local deliveries only. Coal shipments averaged 27,211 tons annually during the 1921-33 period and 22,386 tons during 1934-39. This latter average is about 994 tons a year more than the outbound shipments reported by the applicants. Shipments have fluctuated each year since 1933, when a serious fire curtailed production. Shipments averaged about 9,056 tons annually during the period 1933-35, 27,728 tons in 1936-37. In 1938 the volume handled was 17,632 tons, and in 1939, 40,243 tons. The large increase in the 1939 tonnage is claimed by the applicants to result from a suspension of operations in the unionized bituminous coal fields during April and May of that year."

The witnesses gave various estimates as to the value of the property and mine of the coal corporation, of which the largest was $308,262.13.

The War Department is proceeding with the flood control project under the Flood Control Act of June 28, 1938, 52 Stat. 12, 15. The Commission found that the plans of the Department provide for the relocation of all town sites, highways and other public facilities that will be inundated. Esti-

mates submitted by the carriers and the War Department for relocation of the railroad line ranged from $2,018,000 to $2,519,000, while the estimate of the Coal Corporation indicated that a relocated line sufficient to carry the present traffic could be constructed for $800,000. Estimates made by the contesting parties indicated an increased cost of maintenance if the new line should be built. With respect to the relocation of the line the Commission said:

"* * * Even at the low operating cost urged by the coal company the net system profits annually since 1934 would not have been sufficient to produce a reasonable return upon an investment as low as $800,000."

* * * * * * * *

"The benefits accruing to the public from continued rail transportation service, and the present and prospective needs of the public for such service commensurate with its ability to support a railroad, must be weighted against the loss and inconvenience which might be imposed upon inter- [fol. 60] state commerce. There is no evidence that the line involved herein has heretofore been a burden on the system or that the volume of traffic last reported would not continue to support it in the future if it remained undisturbed. However, the further existence of this line of railway is not possible in view of the need of the land for flood control, and it must give way to a superior public use. If the railroad service now being performed is to be continued the line must be relocated. Considering the expenditure necessarily incident to that relocation and the increased costs of operating the line that will be caused thereby, we conclude that we are not justified by the public convenience and necessity in taking action herein that will require the relocation of the line."

In its opinions the Commission also adverted to the public interest that will be served by erection of the dam. Thus Division 4 said that it was a matter of common knowledge that catastrophes resulting from the uncontrolled flow of the river are not only a menace to the safety of train operation, but increase the cost thereof, and therefore the flood control project when completed will not only benefit the general public but also the railroads; and the subsequent report of the whole Commission stated that the question

presented was whether consideration should be given to the broader interest of the general public in the proposed abandonment, or confined to that interest which relates solely to the transportation public concerned with the facilities of the line of railroad involved and its relationship to interstate commerce. On this point the Commission said:

"* * * It is not disputed that the flood-control program of which the taking of the applicants' property is but a small part, will eventually benefit large number of persons, and including railroads, who, in the past, have suffered from the ravages of uncontrolled waters; that only a comparatively minor interest will be adversely affected by abandonment; that the purchase price to be paid by the Government is reasonable; and that the future of the line concerning traffic and profits therefrom is uncertain. In view of these facts, we conclude that the petitioner's contention is untenable, and that we are not restricted in our deliberations to the considerations indicated by the petitioner. Congress delegated to us the authority to ascertain the facts in these cases and to exercise thereon a judgment whether abandonment would be consistent with the public convenience and necessity."

From this conclusion a dissenting opinion was filed which took the position that the authority of the Commission under Section 1 (18) of the statute is to determine whether lines of railroad should or should not be abandoned from the standpoint of the public interest as it relates to transportation; and that the Commission has no authority to go outside the field of transportation and pass judgment upon the question whether lines of railroad which are not an undue burden upon interstate commerce should be abandoned because a superior public interest demands that they make way for a public improvement, such as the flood control project here involved.

[fol. 61] It is not necessary in this case to decide in which of the Commission's opinions the extent of its authority is more correctly defined. It is true that Congress has given the power to other agencies to decide whether a flood control project that will interfere with the operation of a railroad shall be built; and that in a number of decisions the Supreme Court has held that the criterion to be applied by the Commission in the exercise of its authority is not the

general public welfare, but "The adequacy of transportation service in its essential conditions of economy and efficiency, and to the appropriate provision and best use of transportation facilities." New York Central Securities Co. v. United States, 287 U. S. 12, 24; see also Colorado v. United States, 271 U. S. 153; Texas v. United States, 292 U. S. 522; United States v. Lowden, 308 U. S. 225. But we are primarily concerned with the question whether the action of the Commission in the instant case lay within its powers, and the controversy will be simplified if the discussion is limited to that question. We are justified in doing this because it is obvious from an examination of the reports of the Commission as a whole that it was satisfied, irrespective of the general benefits expected to flow from flood control, that the large expenditure required to relocate the railroad and the increased cost of maintenance in the future would impose an unreasonable burden upon the parent corporation, and that the public convenience and necessity, with respect to transportation, would be served by the abandonment of the line.

The plaintiffs make the contention in this respect that the Commission is without power to permit the abandonment of an established branch road which is serving the public acceptably at a profit to itself; and further, if such a branch road is destroyed by a superior power, that the Commission cannot authorize its abandonment but must sanction its relocation, even though the cost thereof is so high as to preclude a fair return from future operations, provided that the operation of the entire railroad system, main line and branches, will produce a fair return to the carrier.

This contention is based upon certain decisions which relate to actions of State Legislatures or State Commissions, and hold that a railroad carrier may be required by public authority to do a particular act or operate a particular part of its system, unprofitable in itself, if performance does [fol. 62] not involve the question of the profitableness of the operation of the railroad as an entirety. In such case, there is no deprivation of property without due process of law and the controlling authority has the power to consider the nature and extent of the carrier's business, its productiveness, the character of the service required, the public need for it and its effect upon the service already being rendered. If these criteria are reasonably applied, there

is no abuse of power. Atlantic Coast Line v. N. Car. Corp. Com'n., 206 U. S. 1; Ches. & Ohio Ry. v. Pub. Service Comm., 242 U. S. 603; Delaware, L. & W. R. Co. v. Van Santwood, N. D. New York, 216 F. 252, 232, F. 978.

It will be seen that these decisions do not lay down the absolute rule that the operation of a branch road at a loss must in all cases be continued if the system as a whole can be run at a profit; but the question is committed to the reasonable discretion of the controlling State authority. The power of the Interstate Commerce Commission within its field is no less. Section 1 (18) of the Act provides that no carrier shall abandon any portion of a line of railroad or the operation thereof unless there shall first have been obtained from the Commission a certificate that the present or future convenience or necessity permit of such abandonment; and Section 1 (20) provides that the Commission shall have power to issue such a certificate or to refuse it. The decisions already cited show that under these provisions it is left to the Commission to determine whether a proposed abandonment will further the interest of transportation by protecting interstate commerce from undue burdens, and in making this determination, for example, in such a case as ours, the Commission must consider the extent of the whole transportation and the dependence of the community affected upon the particular means of transportation which it is proposed to eliminate. The Commission's problem is to balance the respective interests and to decide whether the injury to the community affected outweights the burdens imposed upon the carrier; and the decision of the Commission is final if there is substantial evidence to support it. Int. Com. Comm. v. Louis. & Nash. R. R., 227 U. S. 88; Florida v. United States, 282 U. S. 194.

Section 1 (18), as we have seen, directs the Commission in making its determination in a case of abandonment to consider not only the present, but also the future public convenience and necessity; and in Transit Commission v. United States, 284 U. S. 360, it was accordingly held that in [fol. 63] deciding whether an unprofitable intrastate branch line should be abandoned, the Commission might properly take into consideration the magnitude of the outlay necessary to comply with a requirement of State authority that certain grade crossings on the branch line be abolished. In like manner the Commission in the instant case was not only authorized but required to take into account the un-

avoidable cessation of the carrier's branch line to make room for the project of flood control, and in so doing, to consider the high cost of relocation of the line and to decide whether, under all of the circumstances of potential traffic and expense, the public interest in respect to interstate transportation would be served by the continued operation of the road in a new location. The familiar problem of balancing conflicting interests was presented, which it was the province of the Commission to solve.

It was obviously in the interest of all concerned that the Commission make its decision in advance of the actual removal of the tracks and the flooding of the line, and this the Commission proceeded to do. It was said in the report of Division 4 of March 6, 1941 that the record showed that within one year the construction of the dam will have reached the point where appropriation of the carrier's land will be necessary, and the operation of the railroad must cease. The final order of the Commission of September 2, 1941 directed that the certificate of convenience and necessity become effective from and after 15 days. It was suggested during the argument before us that the order was premature in that it empowered the carriers to abandon the line before it was actually necessary, but this point was not urged by the protestants before the Commission, or mentioned in their bill of complaint in the pending case. There is no showing that the time for the occupancy of the lands is not now imminent. On the Contrary we were told during the argument that the tracks must be removed within a month if the work upon the flood project is to proceed according to plan. These circumstances do not justify a stay of operation of the Commission's order for the short intervening period.

The plaintiffs further contend that under section 4 of the Flood Control Act of 1938, 33 U. S. C. A. Section 701-c-1, the Secretary of War is authorized not only to acquire in the name of the United States title to the lands necessary for the dam with the funds appropriated for that purpose, but also to reimburse the owners for "highway, railway and utility relocation". We are told that the consent of the [fol. 64] Commission to the abandonment of the line upon the payment to the carrier of only the agreed value of its present line, unjustifiably relieves the United States of its obligation to pay for the relocation of the line and thereby damages the plaintiffs and other shippers in the area.

It is questionable whether the reference in the section to relocation was directed to all owners of the needed lands, or was confined only to the reimbursement of "states, political subdivisions thereof, and other responsible local agencies" for relocations which they might be required to make. However this may be, it is not and cannot be disputed that relocations of railroad lines may be made only with the consent of the Commission. It is the Commission's duty to make the decision, and it is immaterial whether the funds which the carriers propose to expend are to be taken from their general assets or are to be received from the United States in payment for the property. It would seem that the cost of reconstructing the line in a new location would not be a proper element entering into the value of the property taken by the United States, if permission to relocate cannot be obtained; and that an uneconomic outlay of funds would not be in the interests of transportation even though the money be derived from the national government.

We are not unmindful of the loss that will be inflicted upon the coal corporation by the abandonment of the line. It is suggested in the reports of the Commission that justice demands that the corporation be paid for the injury which it will suffer. But this is a matter beyond the scope of the present inquiry. While the Commission may consider the Coal Corporation's loss in making its determination, its decision will have no effect upon the right of the Coal Company to compensation, if any there be. Nor will the decision of this court prejudice the Coal Corporation in this respect.

An order will be signed dismissing the bill of complaint.

I concur. William C. Coleman, U. S. District Judge.

I concur. Luther B. Way, United States District Judge.

[fol. 65] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

No. 1378 Civil Action

STEUART PURCELL, EDMUND H. BUDNITZ and ARTHUR H. BRICE, constituting the Public Service Commission of Maryland, and McCullough Coal Corporation, a Maryland Corporation, Plaintiffs,

versus

THE UNITED STATES OF AMERICA, THE CONFLUENCE and OAKLAND RAILROAD COMPANY and The Baltimore and Ohio Railroad Company, Defendants.

ORDER DISMISSING BILL OF COMPLAINT—Filed October 13, 1941

It is ordered, adjudged and decreed this 13th day of October, 1941, by the District Court of the United States for the District of Maryland:

That the bill of complaint in the above entitled case be dismissed.

Morris A. Soper, United States Circuit Judge. William C. Coleman, United States District Judge. Luther B. Way, United States District Judge.

[fol. 66] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

PETITION FOR APPEAL AND STAY ORDER PENDING APPEAL—Filed November 5, 1941

To the Honorable Morris A. Soper, United States Circuit Judge, and the Honorable William C. Coleman and Luther B. Way, United States District Judges:

Conceiving themselves aggrieved by the order of the United States District Court for the District of Maryland made and entered in the above entitled cause on the 13th day of October, 1941, dismissing the bill of complaint filed

in said cause, the Plaintiffs therein appeal from said order to the Supreme Court of the United States and pray that such appeal may be allowed agreeably to the statutes and rules of the Court in such case made and provided;

And the Plaintiffs further pray that a stay of the Commission's order involved in this appeal may be granted pending determination of said appeal by the Supreme Court of the United States.

Dated: Oct. 31st, 1941.

Joseph Sherbow, General Counsel to the Public Service Commission of Maryland. Clarence W. Miles; Benjamin C. Howard, Attorneys for McCullough Coal Corporation.

[fol. 67] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

ORDER ALLOWING APPEAL AND STAY PENDING APPEAL—Filed November 5, 1941

Upon the petition of Joseph Sherbow, counsel for Stuart Purcell, Edmund H. Budnitz and Arthur H. Brice, constituting the Public Service Commission of Maryland, and Clarence W. Miles and Benjamin C. Howard, attorneys for McCullough Coal Corporation, for an appeal from the final order of this Court entered on October 13, 1941, dismissing the bill of complaint filed in the above entitled cause, and praying that a stay of the Commission's order be granted pending the appeal, it is

Ordered, this 5th day of November, 1941, that the appeal prayed for in the aforegoing petition is hereby granted and allowed and, upon the Plaintiff's filing a bond in the principal sum of $1,000 with sufficient sureties and conditioned as required by law, it is further ordered, no objection thereto being interposed by the Defendants or any of them, that The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company be and they are hereby restrained and enjoined from abandoning the operation of the line of railroad running and extending from Confluence & Oakland Junction, Pennsylvania to Ken-
[fol. 68] dall, Maryland, pending a determination of the

said appeal by the Supreme Court of the United States; and it is further ordered that a citation issue returnable 40 days from the date hereof.

Dated November 5, 1941.

Morris A. Soper, United States Circuit Judge. William C. Coleman, United States District Judge. Luther B. Way, United States District Judge.

[fol. 69] Bond on Appeal for $1,000 approved and filed Nov. 5, 1941, omitted in printing.

[fol. 70] IN DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 5, 1941

Steuart Purcell, Edmund H. Budnitz and Arthur H. Brice, constituting the Public Service Commission of Maryland, by their General Counsel, Joseph Sherbow, and McCullough Coal Corporation by its attorneys, Clarence W. Miles and Benjamin C. Howard, file the following assignment of errors upon which the Plaintiffs rely in the prosecution of the appeal herewith petitioned for in the above entitled cause from the order of this Court entered on the 13th day of October, 1941, to wit:

(1) The Court erred in failing to find that there was no substantial evidence to support the order of the Interstate Commerce Commission granting the application of the Defendant Carriers to abandon the line of railroad running between Confluence & Oakland Junction, Pennsylvania, and Kendall, Maryland.

(2) The Court erred in failing to find that there was no substantial evidence that the public convenience and necessity would be served by the abandonment of the aforesaid line of railroad.

[fol. 71] (3) The Court erred in failing to hold that the Interstate Commerce Commission was without statutory authority to enter the aforesaid order upon the application and evidence before it.

(4) The Court erred in holding that the Commission had found that the interest of the transportation public would be served by the abandonment of the aforesaid line.

(5) The Court erred in holding that the Interstate Commerce Commission properly considered the question of relocation of the aforesaid line.

(6) The Court erred in failing to grant a temporary and permanent injunction restraining enforcement of the aforesaid order of the Interstate Commerce Commission.

Wherefore, the aforesaid Plaintiffs pray that the said order may be reversed and for such other and further relief as to the Court may seem just and proper.

Dated: October 31, 1941.

Joseph Sherbow, General Counsel to the Public Service Commission of Maryland; Clarence W. Miles, Benjamin C. Howard, Attorneys for McCullough Coal Corporation.

[fols. 72-73] Citation in usual form showing service on appellees omitted in printing.

[fol. 74] IN UNITED STATES DISTRICT COURT

NOTICE TO ATTORNEY GENERAL OF MARYLAND

November 4, 1941.

Honorable William C. Walsh, Attorney General of Maryland, Baltimore Trust Building, Baltimore, Maryland.

DEAR SIR:

The United States District Court for the District of Maryland, sitting as a three-Judge Court pursuant to section 47 of 28 U. S. C. A., has granted an appeal to the Supreme Court of the United States to the Plaintiffs in the case of Steuart Purcell, Edmund H. Budnitz and Arthur H. Brice, constituting the Public Service Commission of Maryland and McCullough Coal Corporation *vs.* the United States of America, the Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company.

Section 47a of 28 U. S. C. A. requires the Appellants in such a case to give notice to the Attorney General of the state. Pursuant to such statutory provision the Public Service Commission of Maryland and McCullough Coal Corporation, Appellants, hereby give you notice of said appeal. Attached hereto and made a part hereof are (i) the Petition for appeal and order allowing same, (ii) the Statement as to Jurisdiction, (iii) the Assignment of Errors, (iv) the Citation, and (v) Notice to Appellees as required by rule 12, paragraph 2 of the Supreme Court of the United States.

Very truly yours, Clarence W. Miles, Attorney for McCullough Coal Corporation.

Service of above notice admitted this 7th day of November, 1941.

William C. Walsh, Attorney General of Maryland.

WBR:k.

[fol. 75] In District Court of the United States for the District of Maryland

[Title omitted]

Stipulation as to Preparation and Certification of Transcript of Record—Filed November 17, 1941

To the Clerk of the United States District Court for the District of Maryland.

Sir:

It is hereby stipulated by and between counsel for the parties to the above entitled cause that the transcript of record, to be certified and transmitted to the Supreme Court of the United States pursuant to the appeal heretofore taken in this case, and in conformity with the applicable statutes and rules of the Court, shall include the following:

(1) Bill of Complaint.

(2) Plaintiff's exhibits 1 to 5, inclusive, to Bill of Complaint.

(3) Answer of United States of America.

(4) Answer of Interstate Commerce Commission.

(5) Answer of The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company.

(6) Opinion of the United States District Court for the District of Maryland.

(7) Petition of plaintiffs for appeal and stay pending appeal and order of court thereon.

(8) Assignment of Errors.

(9) Statement as to Jurisdiction.

(10) Citation.

(11) Proof of service under rule 12, paragraph 2 thereof and it is further stipulated by and between counsel for [fol. 76] the parties hereto that, conditioned upon obtaining the approval of this court, the following original papers are to be transmitted to the Supreme Court of the United States:

Plaintiffs' Exhibit A consisting of copies, certified by W. P. Bartel, Secretary of Interstate Commerce Commission of the following papers or document, viz:

(1) Application of Defendants Carriers filed January 15, 1940.

(2) Return to Questionnaire by Defendants Carriers filed on February 15, 1940.

(3) Corrected Return to Questionnaire filed by Defendants Carriers on March 30, 1940.

(4) Transcript of Stenographer's notes of hearing held April 11, 1940 at Cumberland, Maryland before Examiner Nye and Exhibits 1 to 12, inclusive, filed at said hearing.

(5) Transcript of Stenographer's notes of hearing held June 12, 1940 at Washington, D. C. before Examiner Molster and Exhibits 13 to 19 inclusive filed at said hearing.

(5½) Highway map (uncertified) pp. 296-297 Record.

(6) Petition of Plaintiffs for Rehearing filed April 10, 1941.

(7) Reply of United States of America filed April 18, 1941.

(8) Report and Certificate of the Interstate Commerce Commission filed and entered March 6, 1941.

(9) Order of Commission entered June 2, 1941 in finance docket No. 12742 The Confluence and Oakland Railroad Company, et al. abandonment.

Daniel H. Kunkel, For Interstate Commerce Commission; Robert L. Pierce, Counsel for the United States of America; John E. Evans, Sr., Charles R. Webber, Counsel for The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, Joseph Sherbow, Counsel for the Public Service Commission of Maryland; Clarence W. Miles, Benjamin C. Howard, Counsel for McCullough Coal Corporation.

Approved this 17th day of November, 1941. Morris A. Soper, United States Circuit Judge.

[fol. 77] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 78] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE RECORD TO BE PRINTED—Filed December 18, 1941

Come now the appellants and say that they will rely upon the points made in their Assignment of Errors in brief and oral argument before this Court on their appeal in the above entitled cause.

Appellants further state that the entire record in this cause as filed in this Court is necessary for consideration of the points set forth above.

Joseph Sherbow, General Counsel for Public Service Commission of Maryland. Clarence W. Miles, Benjamin C. Howard, Counsel for McCullough Coal Corporation.

Filed the 17th day of December, 1941.

Service of a copy of this "Statement of Points to be Relied Upon and Designation of the Record to be Printed" acknowledged this 17th day of December, 1941.

E. M. Reidy (Dec. 17, 1941), Counsel for Interstate Commerce Commission. Robert L. Pierce (recd. Dec. 17, 1941), Counsel for United States of America. John E. Evans, Sr., Charles R. Webber, Counsel for The Baltimore and Ohio Railroad Company and The Confluence and Oakland Railroad Company.

[fol. 78a] [File endorsement omitted.]

[fol. 79] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—January 5, 1942

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Mr. Justice Roberts took no part in the consideration and decision of this question.

[fol. 80] IN SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 803

STIPULATION AS TO PORTIONS OF THE RECORD TO BE PRINTED—Filed January 28, 1942

It is hereby stipulated by and between the parties to this cause that plaintiffs' Exhibit A filed in this cause in the United States District Court for the District of Maryland, the same being the record of the proceedings before the Interstate Commerce Commission, duly certified to the Dis-

trict Court and included in the record before this Court, may be omitted in printing.

Clarence W. Miles, Benjamin C. Howard, Counsel for Appellant McCullough Coal Corporation. Joseph Sherbow, Counsel for Appellant The Public Service Commission of Maryland. James C. Wilson, Counsel for Appellee United States of America. John E. Evans, Sr., Charles R. Webber, Counsel for Appellees Confluence and Oakland Railroad Co. and the Baltimore and Ohio Railroad Company.

Endorsed on cover: File No. 46,131. Maryland D. C. U. S. Term No. 803. Steuart Purcell, Edmund H. Budnitz and Arthur H. Brice, Constituting the Public Service Commission of Maryland, et al., Appellants, vs. The United States of America, The Confluence and Oakland Railroad Company, et al. Filed December 15, 1941. Term No. 803, O. T. 1941.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 803

STEUART PURCELL, EDMUND H. BUDNITZ AND ARTHUR H. BRICE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, THE CONFLUENCE AND OAKLAND RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

STATEMENT AS TO JURISDICTION.

JOSEPH SHERBOW,
CLARENCE W. MILES,
BENJAMIN C. HOWARD,
Counsel for Appellants.

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IN THE

DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil Docket No. 1378.

STEUART PURCELL, EDMUND H. BUDNITZ AND ARTHUR H. BRICE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, AND McCULLOUGH COAL CORPORATION, A MARYLAND CORPORATION,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, THE CONFLUENCE AND OAKLAND RAILROAD COMPANY AND THE BALTIMORE AND OHIO RAILROAD COMPANY,

Defendants.

JURISDICTIONAL STATEMENT.

Steuart Purcell, Edmund H. Budnitz and Arthur H. Brice, constituting the Public Service Commission of Maryland, by their General Counsel, Joseph Sherbow, and McCullough Coal Corporation, by its attorneys, Clarence W. Miles and Benjamin C. Howard, and pursuant to Rule 12, Paragraph 1, of the Supreme Court of the United States, file this, their statement showing the basis on which they contend that the Supreme Court has appellate

jurisdiction to review on appeal the order appealed from herein, to wit:

I. The statutory provisions believed to sustain the jurisdiction of the Supreme Court of the United States of the above entitled cause are Sections 207, 210, and 238 (4) of the Judicial Code, as amended (28 U. S. C. A. 41 (28), 47a, and 345 (4); Sections 41 and 47 of 28 U. S. C. A.; and Section 1 (20) of the Interstate Commerce Act, as amended (49 U. S. C. A. 1 (20)).

II. The order appealed from was entered on the 13th day of October, 1941. Petition for appeal was presented to the District Court on the 30th day of October, 1941.

III. The cases believed to sustain the jurisdiction are *St. Louis & O'Fallon Railroad Co.* v. *United States*, 279 U. S. 461; *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501; *Virginian Railroad Company* v. *United States*, 272 U. S. 657, and *Colorado* v. *United States*, 271 U. S. 153.

IV. The appeal herein is from an order of the District Court of the United States for the District of Maryland in a civil case in equity, sitting as a three-judge statutory court pursuant to Sections 41 (28), 43-45, 45a-46, 47, and 48 of 28 U. S. C. A., to review an action seeking to enjoin the operation and effect of an order of the Interstate Commerce Commission whereby the abandonment of a line of railroad extending 19.79 miles from Confluence & Oakland Junction, Pennsylvania, to Kendall, Maryland, was authorized.

The District Court assumed jurisdiction of the cause and held a hearing on October 1, 1941. The District Court on October 13, 1941, filed an opinion and entered an order dismissing the bill of complaint.

The Plaintiffs, the Public Service Commission of Maryland and the McCullough Coal Corporation, a Maryland

corporation, brought this action in the District Court seeking an interlocutory and permanent injunction restraining the Defendant Carriers, The Confluence and Oakland Railroad Compay and The Baltimore and Ohio Railroad Company, from abandoning the aforesaid line of railroad and from otherwise acting pursuant to an order of the Interstate Commerce Commission authorizing the said abandonment. The said order was passed by the Interstate Commerce Commission in response to an application filed with it by the Defendant Carriers under Section 1 (18) of the Interstate Commerce Act for a certificate of public convenience and necessity to abandon a line of railroad and operation thereof. The said application disclosed upon its face that the Defendant Carriers were operating the aforesaid line of railroad at a profit and that the sole reason for the filing of the application with the Interstate Commerce Commission was at the behest of the Department of War to facilitate construction of a dam across the Youghiogheny River; that a substantial portion of the said line of railroad would be inundated as a result of the consummation of the Flood-Control Project; and that the Defendant Carriers had given the Secretary of War an option to purchase the said line of railroad conditioned upon obtaining the approval of the Interstate Commerce Commission.

The examiner, assigned by the Interstate Commerce Commission to hear the case, on November 5, 1940 recommended that the application be denied and found that the present and future public convenience and necessity did not permit the abandonment. Exceptions to the examiner's report were filed by the Defendant Carriers and a hearing was thereafter held before Division 4 of the Interstate Commerce Commission. On March 6, 1941, the said Division 4 entered an order approving the application of the Carriers. Thereafter a petition by the Plaintiffs for reargument be-

fore the whole Commission was granted and on July 31, 1941, the Interstate Commerce Commission affirmed the report and order of Division 4, with Chairman Eastman and Commissioners Rogers and Patterson dissenting.

Copies of the opinion of the District Court, and the opinions and reports of the Interstate Commerce Commission, of Division 4 and of the examiner are attached hereto.

The Plaintiffs were at all times parties in the proceedings before the Interstate Commerce Commission and instituted this action pursuant to Section 1 (20) of Part I of the Interstate Commerce Act. The Public Service Commission of Maryland is a Plaintiff because of the irreparable damage and injury which would be caused to the communities served by the said line of railroad sought to be abandoned and to the transportation public of the State of Maryland. The McCullough Coal Corporation is a Plaintiff because the value of its business and properties would be destroyed if the order of the Interstate Commerce Commission is allowed to remain in effect.

Respectfully submitted,

JOSEPH SHERBOW,
General Counsel to the Public Service Commission of Maryland.
CLARENCE W. MILES,
BENJAMIN C. HOWARD,
Attorneys for McCullough Coal Corporation.

EXHIBIT "A".

OPINION OF COURT.

No. 1378 Civil Action.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

STEUART PURCELL, EDMUND H. BUDNITZ and ARTHUR H. BRICE, Constituting the Public Service Commission of Maryland, and McCullough Coal Corporation, a Maryland Corporation, Plaintiffs,

versus

THE UNITED STATES OF AMERICA, THE CONFLUENCE and OAKLAND RAILROAD COMPANY and The Baltimore and Ohio Railroad Company, Defendants.

(Argued October 1, 1941. Opinion filed October 13, 1941.)

Before Soper, Circuit Judge, and William C. Coleman and Way, District Judges.

Joseph Sherbow for the Public Service Commission; Miles and O'Brien (by Clarence W. Miles and Benjamin C. Howard) for McCullough Coal Company; Bernard J. Flynn, United States Attorney, Robert L. Pierce and Elliott Finkel for the United States; Charles R. Webber and John E. Evans for the Baltimore and Ohio Railroad Company and the Confluence and Oakland Railroad Company; and J. H. Kunkel for the Interstate Commerce Commission.

SOPER, CIRCUIT JUDGE:

This suit is instituted under the provisions of the Act of Congress of October 22, 1913, as amended (28 U. S. C. A. 41 (28), 43-45, 45A-46, 47, 48), to enjoin the operation and effect of an order of the Interstate Commerce Commission dated September 2, 1941, whereby the abandonment of a line of railroad extending 19.79 miles from Confluence and Oakland Junction, Pennsylvania, to Kendall, Maryland, was authorized. The plaintiffs in the suit are the Public Service

Commission of Maryland and the McCullough Coal Corporation, a Maryland corporation, which owns a coal mine in Maryland that will be adversely affected if the line of railroad is discontinued. The defendants are the United States and the Confluence and Oakland Railroad Company, a railroad corporation under the laws of Maryland and Pennsylvania, which owns the line of railroad in question, and the Baltimore and Ohio Railroad Company, a Maryland corporation, which operates the railroad as lessee. The Confluence and Oakland Railroad Company is a totally owned subsidiary of the Baltimore and Ohio Railroad Company.

Application was made by the carriers to the Interstate Commerce Commission, under Section 1 (18) of the Interstate Commerce Act, 49 U. S. C. A. 1 (18), for a certificate that the present and future public convenience and necessity permit the abandonment and removal of the line. The reasons given for the proposal were that the United States, acting through the War Department, proposes to construct a flood control dam on the Youghiogheny River about three miles above Confluence, Pennsylvania, which will require the abandonment of the railroad's entire line because it will be submerged for a distance of approximately 12 of its 19.79 miles, and the remainder of the line will become a detached segment without rail connection with any other railroad and will thus become valueless; and that the relocation of the line would require an expenditure that is not justified by the present and prospective revenues of the line, and would constitute an undue burden on interstate commerce without compensating advantage. The application also showed that the carriers had given an option to the United States for a period of 365 days to purchase the railroad for $306,000, (the Railroad Company reserving the right to salvage and remove the rail and other material), subject to the approval and authorization by the Commission of the abandonment of the line. Testimony was taken before an examiner and before Division 4 of the Commission, which found for the carriers in a report of March 6, 1941. Thereupon the McCullough Coal Corporation and the Public Service Commission of Maryland asked a reconsideration on the ground that there was no substantial evidence to support the issuance of the certificate of abandon-

ment, and that the Interstate Commerce Commission was without jurisdiction to grant it. The matter was then heard by the Commission as a whole, and the decision of Division 4 was affirmed.

The facts as found by Division 4 of the Commission, and approved on reargument by the Commission as a whole, may be summarized as follows: The railroad runs through a ~~semi~~ mountainous section following generally Youghiogheny River as far as Kendall. As of December 31, 1936 the original cost to date of the property, exclusive of land and of improvement assessments, was $398,873; and the cost of reproduction less depreciation, and the value of the land, were estimated by the Bureau of Valuation of the Commission to be $350,074 and $8,717 respectively. The carriers estimated the net salvage value of the recoverable property to be $25,965.

During the last five years, train service has consisted of a mixed train in each direction on Tuesdays and Saturdays. The stations along the line are not served by any other railroad. The population, embraced within an area of one-half mile on both sides of the line, is estimated to be 2,000. Farming is carried on to a limited extent. One coal mine, located between Friendsville and Kendall, and operated by the McCullough Coal Corporation, is the only industry of any importance. United States Highway 40 and a paved State highway cross the line at Somerfield and Friendsville, respectively. Improved State highways also parallel it at a substantial distance on each side. Secondary roads traverse the area and afford connections with these highways. No common carrier bus or truck service operates in the immediate territory except at Friendsville, which is served by a truck line operating from Cumberland. Deliveries are made to all points, however, by local and private trucks operating mainly out of Confluence and Somerfield.

The line has been operated at a profit. Setting out the figures with regard to the traffic handled and the revenues received during the years 1934-1939, Division 4 of the Commission found: "Assuming that the system cost of handling traffic originating on or destined to points on the line amounted to 50 percent of the revenues therefrom, the system profits from such traffic during each of the periods

referred to would have been $17,908, $17,544, $27,527, $23,098, $17,764, and $32,769, which, when offset by losses directly attributed to line operations, would result in net system profits of $8,875, $8,6.4, $18,351, $9,018, $6,412 and $23,079. Using a 25 percent operating factor claimed by the protestant to be more representative of the actual cost of handling line traffic over other parts of the system, the profit to the system for the same periods would have been $17,830, $17,406, $32,115, $20,567, $15,304, and $39,463." The report of the Commission added that if operating ratios ranging from 73 to 78 percent are used, the average annual profit was $1,125. The final conclusion of the Commission on this aspect of the case was that there was no evidence that the line involved had theretofore been a burden on the system, or that the volume of traffic last reported would not continue if the line remained undisturbed.

With regard to the business of the McCullough Coal Corporation and the effect upon it of an abandonment of the railroad, the Commission made the following finding;

"The McCullough Coal Corporation, hereinafter referred to as the coal company, owner of bituminous-coal lands and rights, whose mine opening and loading facilities adjoin the right-of-way beyond the flooded area, protests the proposal because it would be deprived of direct rail connections. The record shows that practically the company's entire production is shipped by rail to nearby eastern points. In case the line is abandoned, it would be necessary to use motortrucks between the mine and the nearest railhead at Grantsville, at a cost of about $1.12 a ton. Under such circumstances, the mine would be forced to close down because of inability to compete with other mines more favorably located. Trucks are used now for local deliveries only. Coal shipments averaged 27,211 tons annually during the 1921-33 period and 22,386 tons during 1934-39. This latter average is about 994 tons a year more than the outbound shipments reported by the applicants. Shipments have fluctuated each year since 1933, when a serious fire curtailed production. Shipments averaged about 9,086 tons annually during the period 1933-35, 27,728 tons in 1936-37. In 1938 the volume handled was 17,632 tons, and in 1939,

40,243 tons. The large increase in the 1939 tonnage is claimed by the applicants to result from a suspension of operations in the unionized bituminous coal fields during April and May of that year."

The witnesses gave various estimates as to the value of the property and mine of the coal corporation, of which the largest was $308,262.13.

The War Department is proceeding with the flood control project under the Flood Control Act of June 28, 1938, 52 Stat. 12, 15. The Commission found that the plans of the Department provide for the relocation of all town sites, highways and other public facilities that will be inundated. Estimates submitted by the carriers and the War Department for relocation of the railroad line ranged from $2,018,000 to $2,519,000, while the estimate of the Coal Corporation indicated that a relocated line sufficient to carry the present traffic could be constructed for $800,000. Estimates made by the contesting parties indicated an increased cost of maintenance if the new line should be built. With respect to the relocation of the line the Commission said:

"* * * Even at the low operating cost urged by the coal company the net system profits annually since 1934 would not have been sufficient to produce a reasonable return upon an investment as low as $800,000."

* * * * * * *

"The benefits accruing to the public from continued rail transportation service, and the present and prospective needs of the public for such service commensurate with its ability to support a railroad, must be weighted against the loss and inconvenience which might be imposed upon interstate commerce. There is no evidence that the line involved herein has heretofore been a burden on the system or that the volume of traffic last reported would not continue to support it in the future if it remained undisturbed. However, the further existence of this line of railway is not possible in view of the need of the land for flood control, and it must give way to a superior public use. If the railroad service now being performed is to be continued the line must be

relocated. Considering the expenditure necessarily incident to that relocation and the increased costs of operating the line that will be caused thereby, we conclude that we are not justified by the public convenience and necessity in taking action herein that will require the relocation of the line."

In its opinions the Commission also adverted to the public interest that will be served by erection of the dam. Thus Division 4 said that it was a matter of common knowledge that catastrophes resulting from the uncontrolled flow of the river are not only a menace to the safety of train operation, but increase the cost thereof, and therefore the flood control project when completed will not only benefit the general public but also the railroads; and the subsequent report of the whole Commission stated that the question presented was whether consideration should be given to the broader interest of the general public in the proposed abandonment, or confined to that interest which relates solely to the transportation public concerned with the facilities of the line of railroad involved and its relationship to interstate commerce. On this point the Commission said:

"* * * It is not disputed that the flood-control program of which the taking of the applicants' property is but a small part, will eventually benefit a large number of persons, and including railroads, who, in the past, have suffered from the ravages of uncontrolled waters; that only a comparatively minor interest will be adversely affected by abandonment; that the purchase price to be paid by the Government is reasonable; and that the future of the line concerning traffic and profits therefrom is uncertain. In view of these facts, we conclude that the petitioner's contention is untenable, and that we are not restricted in our deliberations to the considerations indicated by the petitioner. Congress delegated to us the authority to ascertain the facts in these cases and to exercise thereon a judgment whether abandonment would be consistent with the public convenience and necessity."

From this conclusion a dissenting opinion was filed which took the position that the authority of the Commission un-

der Section 1 (18) of the statute is to determine whether lines of railroad should or should not be abandoned from the standpoint of the public interest as it relates to transportation; and that the Commission has no authority to go outside the field of transportation and pass judgment upon the question whether lines of railroad which are not an undue burden upon interstate commerce should be abandoned because a superior public interest demands that they make way for a public improvement, such as the flood control project here involved.

It is not necessary in this case to decide in which of the Commission's opinions the extent of its authority is more correctly defined. It is true that Congress has given the power to other agencies to decide whether a flood control project that will interfere with the operation of a railroad shall be built; and that in a number of decisions the Supreme Court has held that the criterion to be applied by the Commission in the exercise of its authority is not the general public welfare, but "The adequacy of transportation service in its essential conditions of economy and efficiency, and to the appropriate provision and best use of transportation facilities." New York Central Securities Co. *v.* United States, 287 U. S. 12, 24; see also Colorado *v.* United States, 271 U. S. 153; Texas *v.* United States, 292 U. S. 522; United States *v.* Lowden, 308 U. S. 225. But we are primarily concerned with the question whether the action of the Commission in the instant case lay within its powers, and the controversy will be simplied if the discussion is limited to that question. We are justified in doing this because it is obvious from an examination of the reports of the Commission as a whole that it was satisfied, irrespective of the general benefits expected to flow from flood control, that the large expenditure required to relocate the railroad and the increased cost of maintenance in the future would impose an unreasonable burden upon the parent corporation, and that the public convenience and necessity, with respect to transportation, would be served by the abandonment of the line.

The plaintiffs make the contention in this respect that the Commission is without power to permit the abandonment of an established branch road which is serving the public acceptably at a profit to itself; and further, if such a branch

road is destroyed by a superior power, that the Commission cannot authorize its abandonment but must sanction its relocation, even though the cost thereof is so high as to preclude a fair return from future operations, provided that the operation of the entire railroad system, main line and branches, will produce a fair return to the carrier.

This contention is based upon certain decisions which relate to actions of State Legislatures or State Commissions, and hold that a railroad carrier may be required by public authority to do a particular act or operate a particular part of its system, unprofitable in itself, if performance does not involve the question of the profitableness of the operation of the railroad as an entirety. In such case, there is no deprivation of property without due process of law and the controlling authority has the power to consider the nature and extent of the carrier's business, its productiveness, the character of the service required, the public need for it and its effect upon the service already being rendered. If these criteria are reasonably applied, there is no abuse of power. Atlantic Coast Line *v.* N. Car. Corp. Com'n., 206 U. S: 1; Ches. & Ohio Ry. *v.* Pub. Service Comm., 242 U. S. 603; Delaware, L. & W. R. Co. *v.* Van Santwood, N. D. New York, 216 F. 252, 232, F. 978.

It will be seen that these decisions do not lay down the absolute rule that the operation of a branch road at a loss must in all cases be continued if the system as a whole can be run at a profit; but the question is committed to the reasonable discretion of the controlling State authority. The power of the Interstate Commerce Commission within its field is no less. Section 1 (18) of the Act provides that no carrier shall abandon any portion of a line of railroad or the operation thereof unless there shall first have been obtained from the Commission a certificate that the present or future convenience or necessity permit of such abandonment; and section 1 (20) provides that the Commission shall have power to issue such a certificate or to refuse it. The decisions already cited show that under these provisions it is left to the Commission to determine whether a proposed abandonment will further the interest of transportation by protecting interstate commerce from undue burdens, and

in making this determination, for example, in such a case as ours, the Commission must consider the extent of the whole transportation and the dependence of the community affected upon the particular means of transportation which it is proposed to eliminate. The Commission's problem is to balance the respective interests and to decide whether the injury to the community affected outweighs the burdens imposed upon the carrier; and the decision of the Commission is final if there is substantial evidence to support it. Int. Com. Comm. *v.* Louis. & Nash. R. R., 227 U. S. 88; Florida *v.* United States, 282 U. S. 194.

Section 1 (18), as we have seen, directs the Commission in making its determination in a case of abandonment to consider not only the present but also the future public convenience and necessity; and in Transit Commission *v.* United States, 284 U. S. 360, it was accordingly held that in deciding whether an unprofitable intrastate branch line should be abandoned, the Commission might properly take into consideration the magnitude of the outlay necessary to comply with a requirement of State authority that certain grade crossings on the branch line be abolished. In like manner the Commission in the instant case was not only authorized but required to take into account the unavoidable cessation of the carrier's branch line to make room for the project of flood control, and in so doing, to consider the high cost of relocation of the line and to decide whether, under all of the circumstances of potential traffic and expense, the public interest in respect to interstate transportation would be served by the continued operation of the road in a new location. The familiar problem of balancing conflicting interests was presented, which it was the province of the Commission to solve.

It was obviously in the interest of all concerned that the Commission make its decision in advance of the actual removal of the tracks and the flooding of the line, and this the Commission proceeded to do. It was said in the report of Division 4 of March 6, 1941 that the record showed that within one year the construction of the dam will have reached the point where appropriation of the carrier's land will be necessary, and the operation of the railroad must cease.

The final order of the Commission of September 2, 1941 directed that the certificate of convenience and necessity become effective from and after 15 days. It was suggested during the argument before us that the order was premature in that it empowered the carriers to abandon the line before it was actually necessary, but this point was not urged by the protestants before the Commission, or mentioned in their bill of complaint in the pending case. There is no showing that the time for the occupancy of the lands is not now imminent. On the contrary we were told during the argument that the tracks must be removed within a month if the work upon the flood project is to proceed according to plan. These circumstances do not justify a stay of operation of the Commission's order for the short intervening period.

The plaintiffs further contend that under section 4 of the Flood Control Act of 1938, 33 U. S. C. A. Section 701-c-1, the Secretary of War is authorized not only to acquire in the name of the United States title to the lands necessary for the dam with the funds appropriated for that purpose, but also to reimburse the owners for "highway, railway and utility relocation". We are told that the consent of the Commission to the abandonment of the line upon the payment to the carrier of only the agreed value of its present line, unjustifiably relieves the United States of its obligation to pay for the relocation of the line and thereby damages the plaintiffs and other shippers in the area. It is questionable whether the reference in the section to relocation was directed to all owners of the needed lands, or was confined only to the reimbursement of "states, political subdivisions thereof, and other responsible local agencies" for relocations which they might be required to make. However this may be, it is not and cannot be disputed that relocations of railroad lines may be made only with the consent of the Commission. It is the Commission's duty to make the decision, and it is immaterial whether the funds which the carriers propose to expend are to be taken from their general assets or are to be received from the United States in payment for the property. It would seem that the cost of reconstructing the line in a new location would not be a

proper element entering into the value of the property taken by the United States, if permission to relocate cannot be obtained; and that an uneconomic outlay of funds would not be in the interests of transportation even though the money be derived from the national government.

We are not unmindful of the loss that will be inflicted upon the coal corporation by the abandonment of the line. It is suggested in the reports of the Commission that justice demands that the corporation be paid for the injury which it will suffer. But this is a matter beyond the scope of the present inquiry. While the Commission may consider the Coal Corporation's loss in making its determination, its decision will have no effect upon the right of the Coal Company to compensation, if any there be. Nor will the decision of this Court prejudice the Coal Corporation in this respect.

An order will be signed dismissing the bill of complaint.

I concur.

WILLIAM C. COLEMAN,
U. S. District Judge.

I concur.

LUTHER B. WAY,
United States District Judge.

EXHIBIT "B".

Report of Commission on Reargument.

INTERSTATE COMMERCF COMMISSION.

Finance Docket No. 12742.

CONFLUENCE & OAKLAND RAILROAD COMPANY ET AL.
ABANDONMENT.

Submitted July 10, 1941. Decided July 31, 1941

Findings of division 4 that the present and future public convenience and necessity permit abandonment by the Confluence & Oakland Railroad Company of a line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., and abandonment of operation thereof by the Baltimore & Ohio Railroad Company, Lessee, affirmed. Previous report 244 I. C. C. 451.

John E. Evans for applicants.
Elliott W. Finkel for United States of America.
Clarence W. Miles for protestants.

REPORT OF THE COMMISSION ON REARGUMENT.

BY THE COMMISSION:

By report and certificate in this proceeding dated March 6, 1941, 244 I. C. C. 451, division 4 permitted The Confluence and Oakland Railroad Company to abandon, and The Baltimore and Ohio Railroad Company, lessee, to abandon the operation of a line of railroad extending from Confluence & Oakland Junction, Pa., south to Kendall, Md., approximately 19.79 miles, in Somerset and Fayette Counties, Pa., and Garrett County, Md. The case is now before us upon petition of the protestants, the McCullough Coal Corporation and the Public Service Commission of Maryland for reconsideration. Argument has been held pursuant to our order of June 2, 1941, reopening the case.

The following is a brief summary of the facts which are set forth in detail in the previous report.

The line involved is located in the south central part of Pennsylvania and Western Maryland. Practically all the traffic handled is coal which moves from the mine of the McCullough Coal Corporation. Revenues from line operations have averaged about $51,571 annually since 1934, the largest revenue accruing during 1939, the latest year for which data are available. Actual and estimated operating expenses, the latter determined by the use of operating ratios ranging from 73 to about 78 percent, averaged $50,447, on which basis the average annual system profit was $1,125. Substituting 50 percent and 25 percent for these operating ratios, which the protestant alleges are more representative of the fair cost of handling line traffic over other parts of the system, the average annual profits from line operations would have been about $12,395 and $23,781, respectively.

The War Department is constructing a series of impounding dams throughout Pennsylvania to control water flowage in certain tributaries of the Ohio and Monongahela Rivers and thus to eliminate floods in the valleys of those streams. One of these structures is to be built in the valley of the Youghiogheny River, which structure, when completed, will create an artificial lake that will inundate about 12 miles of the line here under consideration. Although the petitioner's coal properties are situated above high-water mark, the interruption of line operations will deprive it of a rail outlet. The Flood Control Act, as amended, among other things, authorizes the Secretary of War to expend public funds to acquire title to all lands, easements, and rights-of-way; to relocate highways, railways, and utilities, and to reimburse those from whom property or rights therein are taken. No reimbursement is to be made however for indirect or speculative damage. Instead of building a new line which, according to present day specifications is estimated by the applicant and the War Department to cost between $2,000,000 and $2,500,000, and requiring abnormal maintenance expenses amounting to $8,000 annually while the track structure is undergoing seasoning, the War Department holds an option to pur-

chase that portion of the line actually required for reservoir purposes for $306,000, the vendor to retain ownership in all property severable from the realty. The exercise of this option is conditioned upon obtaining our permission to abandon the line. The coal company estimates that the cost of duplicating the present line in another location would not exceed $800,000.

The War Department contends on brief and argument as sufficient reasons for the proposed abandonment, the high cost of relocation; the reasonableness of the proposed purchase price; the comparatively low value of the property of the coal company; the uncertainty of its economic value to the community; the slight extent to which it would be affected by discontinuance of the line; the uncertainty of the volume of business furnished to the line; and the superior use to be made of the railroad property by the Federal Government. The petitioners deny most of these contentions and the coal company states it will furnish sufficient coal tonnage in the future to permit of profitable operation of the line, and contends that the public convenience and necessity, which we are called upon to determine, require that if the proposed project is carried to completion, the line must be relocated.

In the previous report division 4 said:

> The benefits accruing to the public from continued rail transportation service, and the present and prospective needs of the public for such service commensurate with its ability to support a railroad, must be weighed against the loss and inconvenience which might be imposed upon interstate commerce. There is no evidence that the line involved herein has heretofore been a burden on the system or that the volume of traffic last reported would not continue to support it in the future if it remained undisturbed. However, the further existence of this line of railway is not possible in view of the need of the land for flood control, and it must give way to a superior public use. If the railroad service now being performed is to be continued the line must be relocated. Considering the expenditure necessarily incident to that relocation and the increased costs of operating the line that will be caused thereby, we

conclude that we are not justified by the public convenience and necessity in taking action herein that will require the relocation of the line.

The question presented to us is whether we should consider the broader interest of the general public in the proposed abandonment and the things that give rise to it, or confine ourselves, as contended by the petitioner, to a consideration of that interest which relates solely to the transportation public concerned with the facilities of the line of railroad involved herein and its relationship to interstate commerce generally.

On brief and at the argument, counsel for the petitioner refers to decisions of the United States Supreme Court dealing not only with the general purposes of the Interstate Commerce Act but with our specific powers such as permitting abandonments in proper cases and establishing the criteria by which those powers must be exercised. It is not disputed that the flood-control program, of which the taking of the applicants' property is but a small part, will eventually benefit large numbers of persons, and including railroads, who, in the past, have suffered from the ravages of uncontrolled waters; that only a comparatively minor interest will be adversely affected by abandonment; that the purchase price to be paid by the Government is reasonable; and that the future of the line concerning traffic and profits therefrom is uncertain. In view of these facts, we conclude that the petitioner's contention is untenable, and that we are not restricted in our deliberations to the considerations indicated by the petitioner. Congress delegated to us the authority to ascertain the facts in these cases and to exercise thereon a judgment whether abandonment would be consistent with the public convenience and necessity. *Colorado* v. *United States*, 271 U. S. 153. That we may consider the cost of future operations and improvements in arriving at such a determination is apparent from the decision of the same court in *Transit Commission* v. *U. S.*, 284 U. S. 360. The War Department cites cases in support of the contention that because of present traffic conditions and the improbability of any increase in the future, the taxpayers should be spared the burden of pay-

ing for relocating the line, and the railroad the expensive cost of future maintenance.

We are not unmindful of the plight in which the coal company will be, when service on the line is terminated, but similar cases in varying degrees are to be found in most contested abandonment cases. It is unfortunate that the law, as construed by the War Department will not permit compensation being paid for the loss of the coal company's business that is certain to follow unless the line is restored at another location. Our duty, however, lies not in determining the property rights of shippers who happen to be discommoded or forced out of business, but as stated in the previous report, to weigh the present and prospective need for the line and the benefits accruing to the public therefrom, against the burdens, present or prospective, that might be imposed upon interstate commerce.

From a consideration of the entire record in this proceeding we find that the present and future public convenience and necessity permit abandonment of the line described herein. It follows therefore that the decision of division 4 must be, and it is hereby, affirmed.

EASTMAN, *Chairman*, dissenting:

We have here a line of railroad which, it is conceded, has been operated at a profit in the past, and there is nothing of record to indicate that it cannot continue to be operated at a profit, if allowed to remain where it now is. The question before us arises under section 1(18) of the Interstate Commerce Act, and is whether the present or future public convenience and necessity permit the abandonment of this line of railroad. Except for one thing, there could be only one possible answer to this question, and that answer would be "No." The single circumstance which, it is contended, justifies changing this answer to "Yes" is that the United States Government is about to build a dam which will inundate a large part of the line. It will not, however, inundate its principal source of traffic, which is a coal mine. If the line is abandoned, the mine will have no rail outlet and cannot continue to operate. It will not be under water, but that fact will afford no financial

consolation. If we find that public convenience and necessity permit the abandonment, the Government has an agreement to buy that part of the line which will be inundated for $306,000, which is a figure based on the capitalized earnings of the entire line, both the part which will be and the part which will not be under water. The Government does not, however, propose to pay a cent to the owners of the coal mine, on the ground that it lacks statutory authority to compensate for "indirect or speculative damage."

It is alleged, and no one disputes the fact, that the dam will be part of an extensive flood-control program which will result in much general public benefit, and that the lessee of the line, the Baltimore & Ohio Railroad Company, will share in this benefit. It is urged, therefore, that in determining whether public convenience and necessity permit the abandonment of the line, we should include in our consideration of the matter this general public benefit. There are, as I see it, two answers to this argument.

In the first place, it is clear that authority from us to abandon the line is not a prerequisite to the building of the dam. It will be built, whether or not we grant such authority. The only difference is that if we grant, it will not be necessary for the Government to exercise the power of eminent domain, whereas, if we do not grant, it will be necessary to invoke that power. In the latter event, the Government may be put to greater expense. From the standpoint of the Government and the broader public interest, therefore, all that is involved here is a matter of dollars and cents.

In the second place, our authority under section 1(18) is to determine whether lines of railroad should or should not be abandoned from the standpoint of the public interest as it relates to transportation. The power plainly was given us for the purpose of protecting the public against abandonments which cannot be justified from that standpoint, and at the same time to lend specific governmental sanction to the abandonment of lines which are shown to be an undue burden upon interstate commerce. As was said in *Colorado* v. *United States*, 271 U. S. 153; "The sole objective of paragraphs 18-20 is the regulation of interstate commerce."

And as was said in another connection in *New York Central Securities Corp.* v. *United States*, 287 U. S. 12:

> The provisions now before us were among the additions made by the Transportation Act 1920, and the term "public interest" as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provisions and best use of transportation facilities, questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred.

Again, in referring to the powers of this Commission in *Schechter* v. *United States*, 296 U. S. 495, the Supreme Court said:

> When the Commission is authorized to issue for the construction, extension *or abandonment of lines, a certificate of "public convenience and* necessity", or to permit the acquisition by one carrier of the control of another, if that is found to be "in the public interest", we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and *can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation.* (Emphasis supplied.)

This Commission has no authority to go outside the field of transportation and pass judgment upon the question whether lines of railroad which are not an undue burden upon interstate commerce should be abandoned because a superior public interest demands that they make way for a public improvement such as the flood-control program here involved. Other statutes which we do not administer provide for a determination of that question in an orderly manner and in accordance with the rules which relate to such determinations.

The United States Government has such a statutory remedy, so far as the building of this dam is concerned, and should proceed with it. In the present proceeding we have

no evidence before us which warrants the conclusion that public convenience and necessity permit the abandonment of this line from the standpoint of the public interest in transportation which it is our duty, and our only duty, to protect. If the Government should pursue its statutory remedy and take a large part of this line by right of eminent domain, it would then be our duty to determine whether the present or future public convenience and necessity require its reconstruction, at possibly great expense, upon a new location; but that question is not before us now.

It is quite possible that in that event another way of settling the matter with justice to all concerned would, or could, be found. As stated above, the railroad is willing to settle for $306,000. The other substantial interest involved is that of the coal mine which is the source of most of the present profitable traffic. The representatives of the Government have stated to us on brief and argument that this mine is of comparatively low value, and, as I understand it, its owners claim a value only slightly in excess of the amount which is to be paid for the railroad. This being the situation, it should be possible, by the aid of further legislation if necessary, to arrive at a reasonable settlement with the owners of the mine which will remove any demand for relocation of the line; and certainly justice demands that they be compensated for the loss which they will suffer upon the abandonment of a railroad which they have enabled, and are prepared to continue to enable, to operate at a profit.

For the reasons stated, I would deny the application.

I am authorized to state that Commissioners Rogers and Patterson join in this expression.

Commissioner Aitchison did not participate in the disposition of this case.

By the Commission.

W. P. BARTEL,
Secretary.

(SEAL)

"EXHIBIT "C".

Report of Interstate Commerce Commission.

INTERSTATE COMMERCE COMMISSION.

Finance Docket No. 12742.

CONFLUENCE & OAKLAND RAILROAD COMPANY, ET AL., ABANDONMENT.

Submitted January 16, 1941. Decided March 6, 1941.

Certificate issued permitting abandonment by the Confluence & Oakland Railroad Company of a line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., and abandonment of operation thereof by the Baltimore & Ohio Railroad Company, lessee.

W. D. Owens and E. W. Young for applicants.

Elliott W. Finkel for United States Department of Justice.

Lawrence A. Layton and W. E. R. Covell for United States War Department in favor of application.

J. W. Medford and H. C. Kearby for Order of Railroad Telegraphers.

Clarence W. Miles, Walter W. Dawson, Benjamin C. Howard, David S. Custer, and C. O. Ross for protestants.

REPORT OF THE COMMISSION.

Division 4, Commissioners Porter, Mahaffie, and Miller.

By Division 4:

Exceptions to the report proposed by the examiner were filed, and the case has been orally argued.

The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, lessee, jointly ap-

plied on January 15, 1940, for permission to the former to abandon, and to the latter to abandon operation of, a line of railroad extending from valuation station 0 minus 13 at Confluence & Oakland Junction, Pa., south to Kendall, Md., approximately 19.79 miles, all in Somerset and Fayette Counties, Pa., and Garrett County, Md. The application is opposed by the Public Service Commission of Maryland. Protests were filed by local interests, and a hearing has been held. All points mentioned herein are in Maryland unless otherwise stated.

The Confluence & Oakland was formed in 1890 by a consolidation and merger of the Confluence & State Line Railroad and the State Line & Oakland Railway. During the same year the entire property was leased for 999 years to the Baltimore & Ohio, the owner of all the outstanding capital stock.

The line operates through a semimountainous section of southwestern Pennsylvania and western Maryland, following generally the Youghiogheny River as far as Kendall. There are numerous curves ranging from 6° to 17°, with prevailing grades of 0.8 percent northbound and 1.36 percent southbound. The track is laid with 60-pound and 67-pound rail, except for about 2.74 miles of 85-pound and larger. No deferred maintenance or need for extraordinary expenditures has been shown. The Confluence & Oakland owns no equipment. As of December 31, 1936, the original cost to date of the property, exclusive of land and assessments for public improvements, was $398,873. As of the same date the cost of reproduction less depreciation and the value of about 124 acres of land and rights in private land were reported by our Bureau of Valuation to have been $350,074 and $8,717, respectively. The applicants report the net salvage value of the recoverable property to be $25,965.

During the past five years train service has consisted of a mixed train in each direction on Tuesdays and Saturdays, operating from Rockwood, a point on the main line about 10 miles east of Confluence & Oakland Junction, where the line connects with the main line of the Baltimore & Ohio. The stations along the line, none of which is served by any other railroad, the population at each, and the ap-

proximate distance in miles from the junction are: Charlestown, Pa., 59, 1; Flanigan, 10, 6; Tub Run, 20, 8; Somerfield, 250, 8; Reason Run, 10, 11; Watson, 25, 12; Geices, Md., 10, 13; Buffalo Run, 10, 14; Selbyport, 100, 15; Friendsville, 600, 17; Kendall, 10, 18. Somerfield and Friendsville are the only agency stations. The total population embraced within an area of 0.5 mile on either side of the line is estimated to be 2,000. Farming is carried on to a limited extent, while lumbering, which flourished at one time, has largely disappeared because of the depletion of standing timber. All coal mines formerly along the line have closed down and been abandoned except one, which is located between Friendsville and Kendall. This is the only industry of any importance.

U. S. Highway 40 and a paved State highway cross the line at Somerfield and Friendsville, respectively. Improved State highways also parallel it at a substantial distance on each side. Secondary roads traverse the area and afford connections with these highways. No common-carrier bus or truck service operates in the immediate territory except at Friendsville, which is served by a truck line operating from Cumberland. Deliveries are made to all points, however, by local and private trucks operating mainly out of Confluence and Somerfield.

The traffic handled over the line during the years 1934-39, in order, was as follows: Local passengers, 346, 239, 320, 566, 367, 430; interline passengers, 22, 8, 11, 4, 16, 8; carloads of freight handled between stations on the line and off-line points, inbound, 502, 195, 222, 201, 196, 134; outbound, 91, 285, 613, 525, 327, 735; less-than-carload, inbound, 227, 326, 383, 381, 321, 249 tons; outbound, 170, 21, 11, 27, 16, 32 tons. No local or bridge freight traffic was handled. During 1934 about 343 carloads of contractors' equipment, supplies, and road-building material were handled over the line. Since then the volume of such traffic, presumably used for maintenance purposes, has fluctuated from 49 carloads received in 1935 to 94 in 1938 and 36 in 1939. An average of 51 carloads of farm products, animals, and fertilizer were received and less than 2 carloads shipped yearly. Inbound coal traffic averaged 5 cars a year, while

outbound shipments each year, 1934-39, in order, were 23, 230, 531, 451, 311, and 725 carloads. Incoming gasoline and oil shipments declined steadily from 98 carloads in 1934 to 30 in 1939, while shipments of forest products declined from 55 to 9 carloads.

The results of line operation during the years 1935-39, in order, as shown by the applicant's income statements, were as follows: Revenues, local and assigned portions of interline, passenger, $87, $52, $64, $70, $63, $67; milk and miscellaneous, $114, $107, $101, $106, $93, $72; freight, inbound, $5,221, $2,297, $2,717, $2,054, $2,634, $1,215; outbound, $637, $2,252, $4,449, $3,690, $2,277, $5,729; system revenues from line traffic, including also minor amounts received by the Alton Railroad and the Staten Island Rapid Transit Railway, passenger, milk, and miscellaneous, $380, $29[illegible]$279, $262, $390, $395; freight originating on line, $6,240, $20,589, $38,887, $30,561, $20,411, $54,065; destined to points on the line, $29,196, $14,201, $15,887, $15,373, $14,768, $11,078; totals, $41,875, $39,796, $62,384, $52,116, $40,636, $72,621. Operating expenses, exclusive of overhead charges, were maintenance of way and structures $6,045, $3,797, $6,226, $9,069, $5,767, $5,738; maintenance of equipment, $1,727, $1,946, $2,242, $2,135, $1,757, $1,965; transportation, $6,308, $6,876, $6,924, $7,067, $7,376, $7,444; railway tax accruals, $1,012, $998, $1,116, $1,729, $1,540, $1,627; totals, $15,092, $13,617, $16,508, $20,000, $16,440, $16,774; cost of handling line traffic over other parts of the system, using composite operating ratios, exclusive of taxes, ranging from 73.14 percent to 77.93 percent, and based upon the volume of line traffic handled over the Baltimore & Ohio and subsidiaries, the Alton Railroad, and the Staten Island Rapid Transit Railway, but influenced mainly by the former $26,250, $26,084, $40,267, $35,132, $27,719, $48,799; losses as an independent line operation, $9,033, $8,910, $9,176, $14,080, $11,372, $9,690; system profits from line traffic, $9,567, $9,004, $14,788, $11,064, $7,850, $16,738, which, offsetting the line deficits shown above, result in profits of $533, $95, $5,612, $3,016 (loss), $3,523 (loss), and $7,048. Local freight, passenger, milk, and miscellaneous revenues are actual, while a portion of the interline revenue was allocated to

the line on a mileage prorate. Maintenance of way and structure expenses are actual, except where an apportionment was made because of overlapping maintenance sections. Maintenance of equipment was divided on system car-mile or locomotive-mile bases. Transportation expense includes the actual cost of operating stations on the line, and trainmen's wages and part of the equipment operating costs were divided according to locomotive-miles and car-miles operated in the different kinds of service. Tax accruals are mainly those assessed against tangible property, but also include gross-receipts, capital-stock, franchise, and special taxes apportioned on a car-mile basis. Assuming that the system cost of handling traffic originating on or destined to points on the line amounted to 50 percent of the revenues therefrom, the system profits from such traffic during each of the periods referred to would have been $17,908, $17,544, $27,527, $23,098, $17,764, and $32,769, which, when offset by losses directly attributed to line operations, would result in net system profits of $8,875, $8,634, $18,351, $9,018, $6,412, and $23,079. Using a 25-percent operating factor claimed by the protestants to be more representative of the actual cost of handling line traffic over other parts of the system, the profit to the system for the same periods would have been $17,830, $17,406, $32,115, $20,567, $15,304, and $39,463.

Pursuant to the provisions of an act of Congress of June 28, 1938 (52 Stat. 1215), the War Department has selected a point on the line about 1 mile from Confluence, for the site of a dam across the Youghiogheny River. This unit is one of six that are scheduled for construction, under construction, or have been completed. Funds for the project have been appropriated by Congress, and also allotted by the Secretary of War to carry on the work, which was to begin in April 1940 and continue for about 3 years. When at full elevation the reservoir thus created will inundate approximately 12 miles of the line from the dam site to a point upstream near Friendsville, leaving available for operation only the 1-mile section below the dam, which is to remain in service as long as it shall be required by the War Department for the delivery and removal of material and equipment used in the construction work. In the

absence of any connection with the applicants' main line or any other railroad, the detached 6-mile segment from the high-water mark south to the end of the line will be rendered inoperative. Plans provide for the relocation of all townsites, highways, and other public facilities that will be inundated. In accordance with the powers granted under the act, including the right to acquire land directly involved by condemnation if necessary, which according to the evidence will be done if the application herein is not approved, the War Department has elected to exercise its option for the purchase of the affected part of the line for $306,000, subject to the approval of the application herein. This option agreement provides that the applicants shall remove all rails, ties, and movable property from the affected area within 90 days after abandonment or forfeit their right thereto.

The applicants and the War Department have submitted four estimates showing that the cost of relocating the line would range from $2,018,000 to $2,519,000, or about $100,000 a mile. These estimates are in considerable detail and show specific routes and definite quantities and unit prices for the different kinds of construction involved. The principal protestant contends that these estimates are exorbitant because of the high unit prices used for land and material, and contemplate a type of construction not warranted by the amount of traffic handled or by the construction standards prevailing on the present line. An engineering witness for the protestant testified that a relocated line sufficient to carry the present traffic could be constructed for about $800,000 or possibly less. The applicants and the War Department assert that there is no economic justification for relocating the line at such a high cost to the taxpayers in the light of the present condition of business and the uncertainty of potential traffic, while the protestants contend that, under the law, the War Department must relocate the line regardless of cost. We are not convinced of the accuracy of any of these estimates. It was also shown by the applicants that a new line built according to any of the estimates would require not only normal maintenance expenditures totaling about $8,000 annually in excess of the cost to maintain the present road, but would also neces-

sitate an additional expense of about $8,000 a year over a period of 5 years while the line is undergoing seasoning. The protestants' estimated maintenance expenditures for the line would be even higher.

The McCullough Coal Corporation, hereinafter referred to as the coal company, owner of bituminous-coal lands and rights, whose mine opening and loading facilities adjoin the right-of-way beyond the flooded area, protests the proposal because it would be deprived of direct rail connections. The record shows that practically the company's entire production is shipped by rail to nearby eastern points. In case the line is abandoned it would be necessary to use motortrucks between the mine and the nearest railhead at Grantsville, at a cost of about $1.12 a ton. Under such circumstances, the mine would be forced to close down because of inability to compete with other mines more favorably located. Trucks are used now for local deliveries only. Coal shipments averaged 27,211 tons annually during the 1921-33 period and 22,386 tons during 1934-39. This latter average is about 994 tons a year more than the outbound shipments reported by the applicants. Shipments have fluctuated each year since 1933, when a serious fire curtailed production. Shipments averaged about 9,086 tons annually during the period 1933-35, 27,728 tons in 1936-37. In 1938 the volume handled was 17,632 tons, and in 1939, 40,243 tons. The large increase in the 1939 tonnage is claimed by the applicants to result from a suspension of operations in the unionized bituminous-coal fields during April and May of that year.

The coal company contends that, in view of the kind of service furnished by the line and the volume of traffic handled, it was erroneous for the applicants to use a system composite operating ratio to determine the cost of handling line traffic over other parts of the system, and also contends that 25 percent would be fair and reasonable. On the latter basis, system profits from line operations for the 1934-39 period would average about $23,781 yearly. Through the use of a 50-percent factor, frequently used in cases of this character, profits would average about $12,395 annually. The returns filed by the applicants show an average annual profit of $1,125.

The coal company argues on brief that we cannot lawfully concern ourselves with the interests of those who in this instance will benefit by the construction of the flood-control project, but must confine our consideration to the interests of the transportation public, or promotion and protection of interstate commerce. The authorities cited in support of that contention appear in the footnote below.[1]

The applicants and the War Department contend that the installation of the reservoir at the site selected, even if it is but one of a number of similar units designed to eliminate floods in the lower Monongahela and upper Ohio River Valleys, creates a public interest greater than the interest of shippers who use the line, and that the application was not submitted because of operating deficits or in anticipation of future losses, but solely to meet the needs of the Federal Government.

Among the numerous cases cited on brief by the War Department are *Transit Commission* v. *United States*, 284 U. S. 360, and *United States Feldspar Corporation* v. *United States*, 38 Fed. (2d) 91. We observe, however, that in most of these cases abandonment was authorized by us because revenues from the traffic handled over the railroad proposed to be abandoned were insufficient to meet ordinary operating expenses and the cost of improvements ordered by the public authorities.

Although the record herein does not contain any evidence showing the cost of repairing flood damage to those segments of the Baltimore & Ohio lying in the lower Monongahela and upper Ohio River Valleys, it is a matter of common knowledge that these catastrophes, which not only menace the safety of train operation but increase the cost of operations because of property destruction and suspension of train service, have occurred at varying intervals during the past, and in all probability will occur in the future until the flood-control project now under construc-

[1] Sharfman on "The Interstate Commerce Commission", Vol. II, page 264, *Colorado* v. *United States*, 271 U. S. 153; *New York Central Securities Corp.* v. *United States*, 287 U. S. 12; *Texas* v. *United States*, 292 U. S. 522; *Schechter* v. *United States*, 295 U. S. 495; *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204; *Akron, etc.*, v. *United States*, 261 U. S. 184.

tion by the War Department is completed. It follows that the project when completed will, in many ways, not only benefit the general public but also the railroads that have been injured in the past.

The record shows that within 1 year the construction of the dam will have reached the point where appropriation of the carrier land will be necessary. The railroad must then cease operations. Whether a substitute line should be provided, regardless of whether the cost of relocating is paid by the applicants or the War Department, is doubtful in the light of the traffic handled during the past 6 years and what may be handled in the future. Even at the low operating cost urged by the coal company the net system profits annually since 1934 would not have been sufficient to produce a reasonable return upon an investment as low as $800,000. The inclusion of the estimated increase in maintenance costs would diminish the rate of return still more. We are of the opinion that the same consideration must be given to the proposed expenditure of public funds for relocating the line that would be given if the railroad were to bear the expense. If public funds are to be used to protect the coal company from loss caused as a result of the national flood-control program this should be done directly and not by means of uneconomic expenditures in railroad construction and maintenance.

Several merchants of Friendsville, whose use of the line averages about 40 carloads of freight annually, oppose the abandonment mainly because of the detrimental effect upon their business. It appears that much of the merchandise handled by them is received and delivered by motortrucks, the railroad being used mainly for cement, feed, and other heavy commodities. Representatives of the Borough of Friendsville also testified to the demoralizing effect the loss of the railroad would have on the economic life of the community. We have heretofore held that matters of the kind last mentioned are not of controlling importance in cases of this character.

The benefits accruing to the public from continued rail transportation service, and the present and prospective needs of the public for such service commensurate with its ability to support a railroad, must be weighed against the

loss and inconvenience which might be imposed upon interstate commerce. There is no evidence that the line involved herein has heretofore been a burden on the system or that the volume of traffic last reported would not continue to support it in the future if it remained undisturbed. However, the further existence of this line of railway is not possible in view of the need of the land for flood control, and it must give way to a superior public use. If the railroad service now being performed is to be continued the line must be relocated. Considering the expenditure necessarily incident to that relocation and the increased costs of operating the line that will be caused thereby, we conclude that we are not justified by the public convenience and necessity in taking action herein that will require the relocation of the line.

We find that the present and future public convenience and necessity permit abandonment by The Confluence and Oakland Railroad Company, and abandonment of operation by The Baltimore and Ohio Railroad Company, lessee, of the branch line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., described in the application. An appropriate certificate will be issued, effective from and after 40 days from its date, in which suitable provisions will be made for the cancelation of tariffs.

MILLER, *Commissioner*, concurring:

I am in entire accord with the purpose of the flood-control project, involved in this proceeding, because of the beneficial results which will accrue to the general public. However, I am not unmindful of the plight in which the abandonment of the railroad will place the coal company, which operates just beyond the area to be flooded and is dependent solely upon railroad service for its continued existence. It would seem, as indicated in the report, that under the circumstances here existing, equitable relief, to which I believe the coal company to be entitled, should be given directly because relocation of the tracks is not justified.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 6th day of March, A. D. 1941.

Finance Docket No. 12742.

CONFLUENCE & OAKLAND RAILROAD COMPANY, ET AL., ABANDONMENT.

Investigation of the matters and things involved in this proceeding having been made, a hearing having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity permit abandonment by The Confluence and Oakland Railroad Company and abandonment of operation by The Baltimore and Ohio Railroad Company of the line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., described in the report aforesaid.

It is ordered, That this certificate shall take effect and be in force from and after 40 days from its date. Tariffs applicable on said line of railroad may be canceled upon notice to this Commission and to the general public by not less than 10 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That The Baltimore and Ohio Railroad Company, when filing schedules canceling tariffs applicable on said line of railroad, shall in such schedules refer to this certificate by title, date, and docket number.

And it is further ordered, That The Baltimore and Ohio Railroad Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

By the Commission, division 4.

W. P. BARTEL,
Secretary.

[SEAL.]

EXHIBIT "D".

INTERSTATE COMMERCE COMMISSION.

Finance Docket No. 12742.

CONFLUENCE & OAKLAND RAILROAD COMPANY, ET AL., ABANDONMENT.

Submitted —— —, ——. Decided —— —, ——.

Recommended that division 4 find that the present and future public convenience and necessity are not shown to permit abandonment by the Confluence & Oakland Railroad Company of its line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., and abandonment of operation thereof by the Baltimore & Ohio Railroad Company, lessee.

W. D. Owens and E. W. Young, for applicants.
Elliott W. Finkel for U. S. Department of Justice.
Lawrence A. Layton and W. E. R. Covell for U. S. War Department in favor of applicant.
J. W. Medford and H. C. Kearby for Order of Railroad Telegraphers.
Clarence W. Miles, Walter W. Dawson, Benjamin C. Howard, David S. Custer, and C. O. Ross for protestants.

REPORT PROPOSED BY A. E. NYE, EXAMINER.

The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, lessee, jointly applied on January 15, 1940, for permission to the former to abandon, and to the latter to abandon operation of, the branch line of railroad extending from valuation station O minus 13 at Confluence & Oakland Junction, Pa., south to Kendall, Md., approximately 19.79 miles, all in Somerset and Fayette Counties, Pa., and Garrett County, Md. The application is opposed by the Public Service Commission of Maryland. Protests were filed by local interests, and a hearing has been held.

The owning company was formed in 1890 by a consolidation and merger of the Confluence & State Line Railroad and the State Line & Oakland Railway. During the same year, the line was leased for 99 years to the Baltimore & Ohio, the owner of all the outstanding capital stock.

The line operates through a semimountainous section following generally the Youghiogheny River as far as Kendall. There are numerous curves ranging from 6° to 17°, with prevailing grades of 0.8 percent northbound and 1.36 percent southbound. The track is laid with 60 and 67-pound rail, except for about 2.74 miles of 85-pound and larger. No deferred maintenance or need for unusual expenditures has been shown. As of December 31, 1936, the original cost to date of the property, exclusive of land and assessments for public improvements, was $398,873. As of the same date the cost of reproduction less depreciation, and the value of the land and rights therein, are reported by the Commission's Bureau of Valuation to have been $350,074 and $8,717, respectively. The applicants report the net salvage value of the recoverable property to be $25,965.

During the past five years train service has consisted of a mixed train in each direction on Tuesdays and Saturdays, operating from Rockwood, a point on the main line about 10 miles east of Confluence & Oakland Junction, where the branch connects with the main line of the Baltimore & Ohio. The stations along the line, none of which is served by any other railroad, the population at each, and the approximate distance in miles from the junction are Charlestown, Pa., 50, 1; Flanigan, 10, 6; Tub Run, 20, 8; Somerfield, 250, 8; Reason Run, 10, 11; Watson, 25, 12; Ceices, Md., 10, 13; Buffalo Run, 10, 14; Selbyport, 100, 15; Friendsville, 600, 17; Kendall, 10, 18. Somerfield and Friendsville are the only agency stations. The total population embraced within an area of 0.5 mile on either side of the line is estimated to be 2,000. Farming is carried on to a limited extent, while lumbering, which flourished at one time, has largely disappeared because of the depletion of standing timber. All coal mines formerly along the line have closed down and been abandoned, except one, located between Friendsville and Kendall. This is the only industry of any importance.

U. S. Highway No. 40 and a paved State highway cross the line at Somerfield and Friendsville, respectively. Improved State Highways also parallel it at a substantial distance on each side. Township roads traverse the area and afford connections with these highways. No common-carrier bus or truck service is operating in the territory except at Friendsville, which is served by a truck line operating from Cumberland, Md. Deliveries are made to all points, however, by local and private trucks from Confluence and Somerfield.

The traffic handled over the line during the years 1934-39, in order, was as follows: Local passengers, 346, 239, 320, 566, 367, 430; interline passengers, 22, 8, 11, 4, 16, 8; carloads of freight handled between stations on the line and beyond (inbound), 502, 195, 222, 201, 196, 134; (outbound), 91, 285, 613, 525, 327, 735; less-than-carload (inbound), 227, 326, 383, 381, 321, 249 tons; (outbound), 170, 21, 11, 27, 16, 32 tons. No local or bridge freight traffic was handled. During 1934 about 345 carloads of contractors' equipment, supplies and roadbuilding material were handled over the line. Since then the volume of such traffic, presumably used for maintenance purposes, has fluctuated from 49 carloads received in 1935, to 94 in 1938, and 36 in 1939. On the average, 51 carloads of farm products, animals, and fertilizer were received and less than 2 carloads shipped yearly. Inbound coal traffic averaged five cars a year, while outbound shipments were 23, 230, 531, 451, 311, and 725 carloads. Gasoline and oil shipments declined steadily from 98 carloads in 1934 to 30 in 1939, while shipments of forest products declined from 55 to 9 carloads.

The results of operation during the years 1935-39, in order, as shown by the applicants' income statements, were as follows: Revenues, local and assigned portions of interline, (passenger), $87, $52, $64, $70, $63, $67; (milk and miscellaneous), $114, $107, $101, $106, $93, $72; Freight (inbound), $5,221, $2,297, $2,717, $2,054, $2,634, $1,215; (outbound), $637, $2,252, $4,449, $3,690, $2,277, $5,729; system revenues from line traffic, including also minor amounts received by the Alton Railroad and the Staten Island Rapid Transit Railway, passenger, milk and miscellaneous, $380, $298, $279, $262, $390, $395; freight originating on line,

$6,240, $20,589, $38,837, $30,561, $20,411, $54,065; destined to points on the line, $29,196, $14,201, $15,887, $15,373, $14,768, $11,078; totals, $41,875, $39,796, $63,384, $52,116, $40,636, $72,621. Operating expenses, exclusive of overhead charges, were maintenance of way and structures, $6,045, $3,797, $6,226, $9,069, $5,767, $5,738; maintenance of equipment, $1,727, $1,946, $2,242, $2,135, $1,757, $1,965; transportation, $6,308, $6,876, $6,924, $7,067, $7,376, $7,444; taxes, $1,012, $998, $1,116, $1,729, $1,540, $1,627; totals, $15,092, $13,617, $16,508, $20,000, $16,440, $16,774; cost of handling line traffic over other parts of the system, $26,250, $26,084, $40,267, $35,132, $27,719, $48,799; operating losses, $9,033, $8,910, $9,176, $14,080, $11,372, $9,690; system profits from line traffic, $9,567, $9,004, $14,788, $11,064, $7,850, $16,738, which credited to the line would reduce the line losses shown above and show system profits of $533, $95, $5,609, $3,016 (deficit), $3,523 (deficit), and $7,048. Local freight, passenger, milk, and miscellaneous revenues are actual, while those earned in connection with the interline traffic were allocated to the line on a mileage prorate. Maintenance of way and structure expenses are actual, except where an apportionment was made because of overlapping maintenance sections; maintenance of equipment on system car and locomotive-mile bases; transportation expense includes the actual cost of operating stations and trainmen's wages, and a part of the equipment operating charges based on locomotive and car-miles in the different kinds of service. Tax accruals are mainly those assessed against the tangible property but also includes gross receipts, capital stock, franchise, and special taxes apportioned on a car-mile basis. Composite operating ratios, exclusive of taxes, based upon the volume of line traffic handled over the Baltimore & Ohio, the Alton Railroad, and the Staten Island Rapid Transit Railway, and ranging from a minimum of 73.14 percent to 77.93 percent, were used in estimating the cost of handling line traffic on other parts of the system.

Pursuant to the provisions of an Act of Congress of June 28, 1938 (52 Stat. 1215), the War Department has selected a point about 1 mile from the north end of the line for the site of a dam across the Youghiogheny River. This unit

is one of six that are definitely scheduled for construction, under construction, or completed. Funds for the project have been appropriated by Congress, and allotted by the Secretary of War to carry on the work, which was to begin in April, 1940, and continue for about three years. When at full elevation the reservoir thus created will inundate approximately 15.24 miles of the line from the dam to a point upstream near Friendsville, leaving capable of operation only the section below the dam, which is to remain in service as long as it shall be required by the War Department for the delivery and removal of material and equipment used in the construction work. In the absence of any connection with the applicants' main line or any other railroad, the segment from the high-water mark to the end of the line will be rendered inoperative. The plans provide for the relocation of all townsites, highways, and facilities subject to inundation. In accordance with the powers granted under the act, including the right to acquire land directly involved, by condemnation if necessary, which according to the evidence will be done if the application herein is not approved, the War Department has elected to exercise its option for the purchase of the affected part of the line for $306,000, subject to the approval of the proposal herein. This option agreement provides that the applicants shall remove all rails, ties, and movable property from the affected area within 90 days after the date of sale or forfeit their right thereto.

The applicants have submitted three estimates showing that the cost of relocating the line would be from $2,018,000 to $2,519,000. The War Department estimates the cost at $2,432,196. The applicants and the War Department insist there is no economic justification for relocating the line at such expense, in view of the character and volume of traffic handled and the improbability of any improvement in the future.

The McCullough Coal Corporation, hereinafter referred to as the coal company, owner of bituminous coal lands and coal rights, whose mine opening and loading facilities adjoin the right-of-way beyond the flooded area, protests the proposal because it would be deprived of direct rail facili-

ties. The record shows that practically its entire production is marketed at nearby eastern points. In case the line is abandoned it would be necessary to use motor trucks between the mine and the nearest railhead at Grantsville, Md., at a cost of about $1.12 a ton. Under these conditions the coal company could not compete with other mines, and would be forced to close down. During the 1921-33 period, coal shipments averaged 27,211 tons annually and 22,386 tons during 1934-39. This latter average is about 722 tons a year more than reported by the applicants. Shipments have fluctuated each year since 1933, when a serious fire curtailed production. During the period 1933-35, shipments averaged about 8,086 tons annually, 29,728 in 1936-37, and 29,037 tons in 1938-39. The large increase in the 1939 tonnage is said by the applicants to result from the suspension of operations in the unionized bituminous coal fields during April and May of that year. This does not accord with the record, however. During 1938 and 1939, total production amounted to 18,972 and 40,102 tons, respectively, while the increased production during the time the strike was in progress amounted to only 8,581 tons over the corresponding period of the previous year.

The coal company contends that, in view of the character and volume of traffic handled over the line, it was erroneous for the applicants to use a composite freight and passenger operating ratio to determine the cost of handling line traffic over other parts of the system, and contends that 25 percent would be fair and reasonable. On this basis, system profits from line operations for 1934-1939 would average about $23,814 a year. At 50 percent, profits would average $8,548 annually.

The applicants and the War Department contend that the construction of the dam in this instance, even if it is but one of a number of similar units designed to eliminate floods in the lower Monongahela and upper Ohio River Valleys, creates a public interest greater than the interest of shippers who use the line, and as argued in brief, the application is not being submitted at this time because of deficits in operating the line or in anticipation of future losses, but solely upon the needs of the Federal Government. The authority of the Commission to permit abandonment on the

grounds stated is questionable. In *Chicago, M., St. P. & P. R. Co. Trustees Abandonment*, 228 I. C. C. 467, 477, decided July 2, 1938, where it was argued that the abandonment of a branch line would retard, if not prohibit, the carrying-out of a constructive flood-control program, the division said:

We are confined to the question of public convenience and necessity from a transportation standpoint alone, and that would be affected by the flood-control program only to the extent that the applicants would be relieved of the expenses of repairing damage caused by flood waters.

In *Colorado & S. Ry. Co. Abandonment*, 221 I. C. C. 329, 341, decided April 30, 1937, where abandonment was urged to provide for the economical construction of a Federal roadbuilding project, the division said:

The bureau's (Public Roads) concern for a proper solution of this problem indicates commendable solicitude for the public interest, but the problem is related to the issue which we are herein called upon to determine, namely, public need for the railroad, only to the extent that the available means of transportation, after substitution of the highway for the railroad, would satisfy the transportation needs of the territory.

In *Motor Bus and Motor Truck Operation*, 140 I. C. C. 685, 737, the Commission said that certificates of public convenience and necessity are required for the purpose of protecting the public interest by excluding unnecessary and wasteful competition and by determining what persons or companies are best able to serve and meet the transportation needs of the public. This public interest to which the Commission must give predominant consideration has been defined by the Supreme Court in numerous cases. In *New York Central S. Corp.* v. *United States*, 287 U. S. 12, decided November 7, 1932, which involved a Commission order under sections 5(2) and 20a of the Interstate Commerce Act, the court said:

• • • and the term "public interest" as thus used is not a concept without ascertainable criteria, but has direct

relation to adequacy of transportation service, to its essential conditions of economy and efficiency and best use of transportation facilities. * * *

In the latter case of *United States* v. *Lowden*, 308 U. S. 225, decided December 4, 1939, which arose under section 5 (4) of the act, the court said that

* * * "public interest" in this section does not refer generally to matters of public concern apart from the public interest in the maintenance of an adequate rail transportation system; that it is used in a more restricted sense defined by reference to the purposes of the Transportation Act of 1920, * * *.

The cases cited are sufficient to demonstrate that the public interest with which the Commission is concerned in this proceeding is limited to that of the necessities and convenience of the shipping and traveling public, and the effect upon such users of transportation, and interstate commerce generally, of the proposed abandonment. Division 4, therefore, should confine its consideration to the evidence relating to the transportation needs of the community served by the line and its value as an artery of interstate commerce. Inasmuch as Congress has directed the War Department how to acquire the land necessary to carry out the program, this Commission should not substitute its authority to accomplish by indirection what can be done directly and in accordance with the law under which the other agency of Government is functioning. The War Department argues on brief that the granting of the application herein will save the tax-paying public the high cost of relocating the line and cites *United States Feldspar Corporation* v. *United States*, 38 Federal 2nd, 91, decided February 12, 1930, where an industry affected by an abandonment authorized by the division in *Fonda, J. & G. R. Co. Abandonment*, 158 I. C. C. 379, decided December 10, 1929, sought an injunction to prevent flooding the carrier's right-of-way and interrupting train service until the line could be relocated. The carrier had already received a substantial award from the State, including relocation costs, pursuant to condemnation proceedings, when application for abandonment was

filed with this Commission. In deciding the case the division restricted not only the scope of the evidence considered but confined its findings to the transportation features as related to the public convenience and necessity by saying:

> • • • While it is clear from the judgment entered by the court that one of the elements of damage included in the award was the cost of relocating the line, we are required primarily to decide from the evidence only whether the public convenience and necessity permit abandonment of operation between the stations named. (p. 380)
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> • • • • • • •
>
> In the primary question of public necessity for this line, the financial and legal relations between the applicant and the State should not affect the finding. The evidence not only fails to establish the existence of sufficient need for rail service between Broadalbin Junction and Northville to warrant the continuation thereof, but it also shows that other means of transportation are used and may be extended to meet substantially all requirements. • • • (p. 387)

In the Feldspar case a 3-judge court approved the findings of the Commission, referred to the territory served by the line as having long been dying economically, and found that whatever transportation was necessary could be substantially furnished by motor trucks. The abandonment, therefore, was indirectly approved by the court not because the land was required by the State for flood-control purposes as implied in brief, but only because there was insufficient traffic to support the line.

Several merchants of Friendsville whose use of the line averages about 40 carloads annually oppose the abandonment mainly because of the detrimental effect upon their business. It appears that much of the merchandise sold by them is delivered by motor trucks, the railroad being used mainly for cement, feed, and other heavy commodities. Representatives of the Borough of Friendsville also testified to the demoralizing effect the loss of the railroad would have on the economic life of the community. The Commis-

sion has repeatedly said that matters such as these are not of controlling importance.

The benefits accruing to the public from continued rail transportation service, the present and prospective needs of the public for such service commensurate with its ability to support a railroad, and the loss and inconvenience resulting from abandonment, must be weighed against the disabilities under which the applicants conduct their business. There is no evidence that the operation of the line has burdened the system in the past. The testimony shows that the present volume of traffic is expected to continue indefinitely. Under these circumstances there is no justification for authorizing abandonment of the line at this time.

It is recommended that division 4 find that the present and future public convenience and necessity are not shown to permit abandonment by The Confluence and Oakland Railroad Company, and abandonment of operation by The Baltimore and Ohio Railroad Company, lessee, of the branch line of railroad in Somerset and Fayette Counties, Pa., and Garrett County, Md., described in the application. An appropriate order should be entered.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 803

STEUART PURCELL, EDMUND BUDNITZ AND ARTHUR H. BRICE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, AND McCULLOUGH COAL CORPORATION, A MARYLAND CORPORATION,
Appellants,

v.

THE UNITED STATES OF AMERICA, THE CONFLUENCE & OAKLAND RAILROAD COMPANY AND THE BALTIMORE & OHIO RAILROAD COMPANY,
Appellees.

BRIEF OF APPELLANTS.

JOSEPH SHERBOW,
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WILLIAM B. RAFFERTY,
Of Counsel.

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Appellees.

BRIEF OF APPELLANTS.

OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Maryland is reported in 41 F. Supp., 309. The report of the Interstate Commerce Commission, sitting as a full commission, is reported at 247 I. C. C. Rep., 399. The report of Division 4 of the Interstate Commerce Commission is reported at 244 I. C. C. Rep., 451.

JURISDICTIONAL STATEMENT.

The Appellants herein invoke the jurisdiction of this Court to review an order of the United States Court for the District of Maryland (hereinafter referred to as the "District Court") in a civil case in equity, sitting as a three judge statutory court pursuant to Sections 207, 210 and 238 (4) of the Judicial Code, as amended (28 U. S. C. A. 41 (28), 47a, and 345 (4); Section 1 (20) of Part 1 of the Interstate Commerce Act, as amended 49 Stat., 543 (49 U. S. C. A. 1 (20)). The District Court reviewed an action instituted by the Appellants herein to enjoin the operation and effect of an order of the Interstate Commerce Commission (hereinafter referred to as "the Commission") authorizing the abandonment of a line of railroad from Confluence and Oakland Junction, Pennsylvania, to Kendall, Maryland.

The District Court assumed jurisdiction of the cause and on October 13, 1941 filed an opinion and entered an order dismissing the bill of complaint filed by the Appellants. The express statutory right to a review of the aforesaid order by this Court is conferred by Section 238 of the Judicial Code (28 U. S. C. A. 345).

HISTORY OF THE CASE.

The Confluence and Oakland Railroad Company and the Baltimore and Ohio Railroad Company as owner and operator, respectively, (hereinafter sometimes jointly referred to as "Carrier") filed on January 15, 1940 with the Commission a joint application (R. p. 21) under Section 1 (18) of Part 1 of the Interstate Commerce Act for a certificate that the present and future public convenience and necessity justify the abandonment and removal of the aforementioned entire line of railroad extending from Confluence and Oakland Junction, Pennsylvania, to Kendall, Maryland, a distance of approximately 19.79 miles. According

to the application, the Confluence and Oakland Railroad Company is the owner of the railroad line in question and the Baltimore and Ohio Railroad Company, as the owner of all of the outstanding shares of stock and bonds of the former company, has agreed to operate the property for its own account and pay all the expenses of such operation, without accounting to the Confluence and Oakland Railroad Company for the result of the operations.

The sole reason assigned for the proposed abandonment, as stated in the application and in the return to the questionnaire (see pp. 6, 28, 29 of Plaintiffs' Exh. A) is that the War Department of the United States Government proposes to construct a flood control dam on the Youghiogheny River above Confluence, Pennsylvania, which will cause the inundation of a part of the line with the result that the line will become a detached segment. It is further stated in the application and answers to the questionnaire that the Carrier is seeking authority to abandon the line "at the behest of the United States Government" and that an option has been given by the Carrier to the United States of America to purchase the line for the sum of $306,000, subject, however, "to the approval and authorization of the abandonment of the Confluence and Oakland branch by the Interstate Commerce Commission." It is further stated by the Carrier in its application that the line has annually, over a period of years, produced a net profit to the Baltimore and Ohio Railroad.

Hearings on the application were held at Cumberland, Maryland, and Washington, D. C., before duly authorized examiners of the Commission, at which the Public Service Commission of Maryland and the McCullough Coal Corporation, appellants herein, appeared in opposition to the granting thereof. Other protestants at such hearings included a number of shippers and other representatives of

the community of Friendsville and the contiguous territory affected by the proposed abandonment.

A report was filed by Examiner A. G. Nye on November 5, 1940 (R. p. 11) recommending that the application be denied and finding therein that the present and future public convenience and necessity did not permit of such abandonment.

Exceptions to the Examiner's report were thereafter filed in behalf of the War Department and the Carrier and on March 6, 1941, Division 4 of the Commission filed its report approving the proposed abandonment (R. p. 20).

Thereafter, on the petition of the Appellants, the Commission sat as a whole for the purpose of hearing reargument and on July 31, 1941 filed its Report (hereinafter referred to as "the Report of the Commission") affirming the report and order of Division 4 (R. p. 31). A dissenting opinion was filed by Chairman East. an in which Commissioners Rogers and Patterson concurred (R. p. 35).

The Commission on September 2, 1941 issued its order or certificate authorizing the abandonment in question and the Appellants shortly thereafter filed their Bill of Complaint (R. p. 1). A three-judge-court was convened for the purpose of reviewing the Report of the Commission and its said order or certificate authorizing the proposed abandonment.

The District Court on October 13, 1941 filed an opinion (R. p. 43) and entered its order dismissing the bill of complaint filed by the Appellants. A petition for appeal and stay order pending appeal was filed with the lower court on November 5, 1941. On the same day the lower court allowed the appeal and further ordered that, no objection

being interposed by the Appellees, upon the Appellants filing a proper bond, the Appellees be restrained and enjoined from abandoning the operation of the line or railroad running and extending from Confluence and Oakland Junction, Pennsylvania, to Kendall, Maryland, pending a determination of the said appeal by this Court.*

Thereafter, on January 5, 1942, this Court noted probable jurisdiction of the case.

STATEMENT OF FACTS.

The testimony and evidence before the Commission is contained in the following documents (all of which have been filed with the Clerk of this Court as "Plaintiffs' Exhibit A") certified by the Secretary of the Interstate Commerce Commission, viz:

(1) Application of the Carrier filed on January 15, 1940.

(2) The Carrier's return to questionnaire filed on February 15, 1940.

(3) The Carrier's corrected return to questionnaire filed on March 30, 1940.

(4) Transcript of stenographer's notes of hearing held on April 11, 1940 at Cumberland, Maryland, before Examiner Nye and Exhibits 1 to 12, inclusive, filed at said hearing.

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* On December 24, 1941 the Government filed a petition in the United States Court for the Western District of Pennsylvania to condemn that portion of the aforesaid line of railroad lying in Pennsylvania and seeking possession of the same. On December 30, 1941 the Government filed a similar petition in the United States Court for the District of Maryland for the condemnation of that portion of the said line of railroad lying in Maryland and seeking possession of the same. Hearings were held in both proceedings on motions for possession. On January 24, 1942 the United States Court for the District of Maryland denied the motion of the Government for immediate possession holding that, in view of the representations made by the Government at the time of the hearing before the Statutory Court in these proceedings and in view of the pendency of this appeal and the stay order pending final determination by this Court, justice required that the status quo of the case be maintained. The United States Court for the Western District of Pennsylvania has, as yet, entered no order on the motion for possession.

(5) Transcript of stenographer's notes of hearing held on June 12, 1940 at Washington, D. C. before Examiner Molster and Exhibits 13 to 19, inclusive, filed at said hearing.

(5½) One highway map (uncertified).

(6) Petition of Plaintiffs for rehearing filed on April 10, 1941.

(7) Reply of United States of America to petition for rehearing, filed on April 18, 1941.

(8) Report and certificate of the Commission filed and entered on March 6, 1941.

(9) Order of Commission entered on June 2, 1941 in Finance Docket No. 12742, The Confluence and Oakland Railroad Company et al, abandonment.

It has been stipulated by counsel that the above documents may be omitted in printing the record before this Court (R. p. 60).

Counsel for the parties hereto have also agreed that the findings of fact as found in the report of Division 4 of the Commission (R. p. 20) represent a fair condensation of the facts presented to the Commission in the proceeding and upon which the report of the Commission and its certificate of abandonment were based. The findings are as follows:

> "The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company, lessee, jointly applied on January 15, 1940, for permission to the former to abandon, and to the latter to abandon operation of, a line of railroad extending from valuation station O minus 13 at Confluence & Oakland Junction, Pa., south to Kendall, Md., approximately 19.79 miles, all in Somerset and Fayette Counties, Pa., and Garrett County, Md. The application is opposed by the Public Service Commission

of Maryland. Protests were filed by local interests, and a hearing has been held. All points mentioned herein are in Maryland unless otherwise stated.

The Confluence & Oakland was formed in 1890 by a consolidation and merger of the Confluence & State Line Railroad and the State Line & Oakland Railway. During the same year the entire property was leased for 999 years to the Baltimore & Ohio, the owner of all the outstanding capital stock.

The line operates through a semimountainous section of southwestern Pennsylvania and western Maryland, following generally the Youghiogheny River as far as Kendall. There are numerous curves ranging from 6° to 17°, with prevailing grades of 0.8 percent northbound and 1.36 percent southbound. The track is laid with 60-pound and 67-pound rail, except for about 2.74 miles of 85-pound and larger. No deferred maintenance or need for extraordinary expenditures has been shown. The Confluence & Oakland owns no equipment. As of December 31, 1936, the original cost to date of the property, exclusive of land and assessments for public improvements, was $398,873. As of the same date the cost of reproduction less depreciation and the value of about 124 acres of land and rights in private land were reported by our Bureau of Valuation to have been $350,074 and $8,717, respectively. The applicants report the net salvage value of the recoverable property to be $25,965.

During the past five years train service has consisted of a mixed train in each direction on Tuesdays and Saturdays, operating from Rockwood, a point on the main line about 10 miles east of Confluence & Oakland Junction, where the line connects with the main line of the Baltimore & Ohio. The stations along the line, none of which is served by any other railroad, the population at each, and the approximate distance in miles from the junction are: Charlestown, Pa., 50, 1; Flanigan, 10, 6; Tub Run, 20, 8; Somerfield, 250, 8; Reason Run, 10, 11; Watson, 25, 12; Geices, Md., 10, 13;

Buffalo Run, 10, 14; Selbyport, 100, 15; Friendsville, 600, 17; Kendall, 10, 18. Somerfield and Friendsville are the only agency stations. The total population embraced within an area of 0.5 mile on both sides of the line is estimated to be 2,000. Farming is carried on to a limited extent, while lumbering, which flourished at one time, has largely disappeared because of the depletion of standing timber. All coal mines formerly along the line have closed down and been abandoned except one, which is located between Friendsville and Kendall. This is the only industry of any importance.

U. S. Highway 40 and a paved State highway cross the line at Somerfield and Friendsville, respectively. Improved State highways also parallel it at a substantial distance on each side. Secondary roads traverse the area and afford connections with these highways. No common-carrier bus or truck service operates in the immediate territory except at Friendsville, which is served by a truck line operating from Cumberland. Deliveries are made to all points, however, by local and private trucks operating mainly out of Confluence and Somerfield.

The traffic handled over the line during the years 1934-39, in order, was as follows: Local passengers, 340, 239, 320, 566, 367, 430; interline passengers, 22, 8, 11, 4, 16, 8; carloads of freight handled between stations on the line and off-line points, inbound, 502, 195, 222, 201, 196, 134; outbound, 91, 285, 613, 525, 327, 735; less-than-carload, inbound, 227, 326, 383, 381, 321, 249 tons; outbound, 170, 21, 11, 27, 16, 32 tons. No local or bridge freight traffic was handled. During 1934 about 343 carloads of contractors' equipment, supplies, and road-building material were handled over the line. Since then the volume of such traffic, presumably used for maintenance purposes, has fluctuated from 49 carloads received in 1935 to 94 in 1938 and 36 in 1939. An average of 51 carloads of farm products, animals, and fertilizer were received and less than 2 carloads

shipped yearly. Inbound coal traffic average 5 cars a year, while outbound shipments each year, 1934-39, in order, were 23, 230, 531, 451, 311, and 725 carloads. Incoming gasoline and oil shipments declined steadily from 98 carloads in 1934 to 30 in 1939, while shipments of forest products declined from 55 to 9 carloads.

The results of line operation during the years 1935-39, in order, as shown by the applicant's income statements, were as follows: Revenues, local and assigned portions of interline, passenger, $87, $52, $64, $70, $63, $67; milk and miscellaneous, $114, $107, $101, $106, $93, $72; freight, inbound, $5,221, $2,297, $2,717, $2,054, $2,634, $1,215; outbound, $637, $2,252, $4,449, $3,690, $2,277, $5,729; system revenues from line traffic, including also minor amounts received by the Alton Railroad and the Staten Island Rapid Transit Railway, passenger, milk, and miscellaneous, $380, $298, $279, $262, $390, $395; freight originating on line, $6,240, $20,589, $38,887, $30,561, $20,411, $54,065; destined to points on the line, $29,196, $14,201, $15,887, $15,373, $14,768, $11,078; totals, $41,875, $39,796, $62,384, $52,116, $40,636, $72,621. Operating expenses, exclusive of overhead charges, were maintenance of way and structures, $6,045, $3,797, $6,226, $9,069, $5,767, $5,738; maintenance of equipment, $1,727, $1,946, $2,242, $2,135, $1,757, $1,965; transportation, $6,308, $6,876, $6,924, $7,067, $7,376, $7,444; railway tax accruals, $1,012, $998, $1,116, $1,729, $1,540, $1,627, totals, $15,092, $13,617, $16,508, $20,000, $16,440, $16,774; cost of handling line traffic over other parts of the system, using composite operating ratios, exclusive of taxes, ranging from 73.14 percent to 77.93 percent, and based upon the volume of line traffic handled over the Baltimore & Ohio and subsidiaries, the Alton Railroad, and the Staten Island Rapid Transit Railway, but influenced mainly by the farmer, $26,250, $26,084, $40,267, $35,132, $27,719, $48,799; losses as an independent line operation, $9,033, $8,910, $9,176, $14,080, $11,372, $9,690; system profits from line traffic, $9,567, $9,004, $14,788, $11,064, $7,850, $16,738, which, offsetting the line deficits shown above,

result in profits of $533, $95, $5,612, $3,016 (loss) $3,523 (loss), and $7,048. Local freight, passenger, milk, and miscellaneous revenues are actual, while a portion of the interline revenue was allocated to the line on a mileage prorate. Expenses of maintenance of way and structure are actual, except where an apportionment was made because of overlapping maintenance sections. Maintenance of equipment was divided on System car-mile or locomotive-mile bases. Transportation expense includes the actual cost of operating stations on the line, and trainmen's wages and part of the equipment operating costs were divided according to locomotive-miles and car-miles operated in the different kinds of service. Tax accruals are mainly those assessed against tangible property, but also include gross-receipts, capital-stock, franchise, and special taxes apportioned on a car-mile basis. Assuming that the system cost of handling traffic originating on or destined to points on the line amounted to 50 percent of the revenues therefrom, the system profits from such traffic during each of the periods referred to would have been $17,908, $17,544, $27,527, $23,098, $17,764, and $32,769, which, when offset by losses directly attributed to line operations, would result in net system profits of $8,875, $8,634, $18,351, $9,018, $6,412, and $23,079. Using a 25-percent operating factor claimed by the protestants to be more representative of the actual cost of handling line traffic over other parts of the system, the profit to the system for the same periods would have been $17,830, $17,406, $32,115, $20,567, $15,304, and $39,463.

Pursuant to the provisions of an act of Congress of June 28, 1938 (52 Stat. 1215), the War Department has selected a point on the line about 1 mile from Confluence, for the site of a dam across the Youghiogheny River. This unit is one of six that are scheduled for construction, are under construction, or have been completed. Funds for the project have been appropriated by Congress, and also allotted by the Secretary of War to carry on the work, which was to begin

in April 1940 and continue for about 3 years. When at full elevation the reservoir thus created will inundate approximately 12 miles of the line from the dam site to a point upstream near Friendsville, leaving available for operation only the 1-mile section below the dam, which is to remain in service so long as it shall be required by the War Department for the delivery and removal of material and equipment used in the construction work. In the absence of any connection with the applicants' main line or any other railroad, the detached 6-mile segment from the high-water mark south to the end of the line will be rendered inoperative. *Plans provide for the relocation of all townsites, highways, and other public facilities that will be inundated.* In accordance with the powers granted under the act, including the right to acquire land directly involved by condemnation if necessary, which according to the evidence will be done if the application herein is not approved, the War Department has elected to exercise its option for the purchase of the affected part of the line for $306,000, subject to the approval of the application herein. This option agreement provides that the applicants shall remove all rails, ties, and movable property from the affected area within 90 days after abandonment or forfeit their right thereto.

The applicants and the War Department have submitted four estimates showing that the cost of relocating the line would range from $2,018,000 to $2,519,000, or about $100,000 a mile. These estimates are in considerable detail and show specific routes and definite quantities and unit prices for the different kinds of construction involved. The principal protestant contends that these estimates are exorbitant because of the high unit prices used for land and material, and contemplate a type of construction not warranted by the amount of traffic handled or by the construction standards prevailing on the present line. An engineering witness for the protestant testified that a relocated line sufficient to carry the present traffic could

be constructed for about $800,000 or possibly less. The applicants and the War Department assert that there is no economic justification for relocating the line at such a high cost to the taxpayers in the light of the present condition of business and the uncertainty of potential traffic, while the protestants contend that, under the law, the War Department must relocate the line regardless of cost. We are not convinced of the accuracy of any of these estimates. It was also shown by the applicants that a new line built according to any of the estimates would require not only normal maintenance expenditures totaling about $8,000 annually in excess of the cost to maintain the present road, but would also necessitate an additional expense of about $8,000 a year over a period of 5 years while the line is undergoing seasoning. The protestants' estimated maintenance expenditures for the line would be even higher.

The McCullough Coal Corporation, hereinafter referred to as the coal company, owner of bituminous-coal lands and rights, whose mine opening and loading facilities adjoin the right-of-way beyond the flooded area, protests the proposal because it would be deprived of direct rail connections. The record shows that practically the company's entire production is shipped by rail to nearby eastern points. In case the line is abandoned it would be necessary to use motor trucks between the mine and the nearest railhead at Grantsville, at a cost of about $1.12 a ton. *Under such circumstances, the mine would be forced to close down because of inability to compete with other mines more favorably located.* Trucks are used now for local deliveries only. Coal shipments averaged 27,211 tons annually during the 1921-33 period and 22,386 tons during 1934-39. This latter average is about 994 tons a year more than the outbound shipments reported by the applicants. Shipments have fluctuated each year since 1933, when a serious fire curtailed production. Shipments averaged about 9,086 tons annually during the period 1933-35, 27,728 tons in 1936-37. In 1938 the

volume handled was 17,632 tons, and in 1939, 40,243 tons. The large increase in the 1939 tonnage is claimed by the applicants to result from a suspension of operations in the unionized bituminous-coal fields during April and May of that year.

The coal company contends that, in view of the kind of service furnished by the line and the volume of traffic handled, it was erroneous for the applicants to use a system composite operating ratio to determine the cost of handling line traffic over other parts of the system, and also contends that 25 percent would be fair and reasonable. On the latter basis, system profits from line operations for the 1934-39 period would average about $23,781 yearly. Through the use of a 50-percent factor, frequently used in cases of this character, profits would average about $12,395 annually. The returns filed by the applicants show an average annual profit of $1,125." (Italics ours.)

SPECIFICATION OF ERRORS.

Appellants contend that the District Court erred in:

(1) Failing to find that there was no substantial evidence to support the order of the Commission granting the application of the Carrier to abandon the line of railroad running between Confluence & Oakland Junction, Pennsylvania, and Kendall, Maryland.

(2) Failing to find that there was no substantial evidence that the public convenience and necessity would be served by the abandonment of the aforesaid line of railroad.

(3) Failing to hold that the Commission was without statutory authority to enter the aforesaid order upon the application and evidence before it.

(4) Holding that the Commission had found that the interest of the transportation public would be served by the abandonment of the aforesaid line.

(5) Holding that the Commission properly considered the question of relocation of the aforesaid line.

(6) Failing to grant a temporary and permanent injunction restraining enforcement of the aforesaid order of the Commission.

SUMMARY OF ARGUMENT.

I.

The Commission was without statutory authority to grant the application of the Carrier.

A.

The Commission was without jurisdiction to permit an abandonment upon the grounds stated in the application.

The application and return to the questionnaire disclosed on their face that the sole reason for the abandonment was the flood control project. The application should have been denied forthwith because of lack of jurisdiction by the Commission to order an abandonment on such ground.

B.

The order of the Commission is not based upon substantial evidence.

(i) The evidence conclusively shows that the railroad is rendering a necessary service. The abandonment of the service would concededly destroy the business of the Appellant, McCullough Coal Corporation and would irreparably injure, if not destroy, the business of numerous other shippers dependent upon the line.

(ii) The evidence is uncontradicted that the railroad has been and is now operated at a profit. The only dispute is as to the *amount* of the profit.

(iii) The evidence as to the purported superior public benefit involved in the flood control project was not properly before the Commission. The measure to be applied is the public interest *as the same relates to transportation.*

II.

The Commission's findings with respect to the question of relocation were contrary to law.

A.

The Commission was in error in holding that the Carrier would be entitled to earn a return upon the investment in the cost of relocation, regardless of the source of the funds with which such cost of relocation would be defrayed.

If such cost is to be borne by the Secretary of War as a part of the cost of the flood control project, resulting from the inundation of a necessary railroad, the cost thereof would be donated capital and hence not an investment of the Carrier upon which it would be entitled to earn a return.

B.

The Commission was in error in holding that the Carrier would be entitled to earn a return upon an investment by it in the cost of relocation.

If such cost is to be borne by the Carrier, it would be entitled to earn a sum sufficient to defray the expense of operating and maintaining the relocated branch line and, as a matter of law, should be required to continue such operation in the absence of any evidence that such continuance thereof would constitute a burden upon the system. The evidence is conclusive

that the Carrier's revenues are sufficient to defray such expense of operation and maintenance and that its business will continue to produce revenues sufficient to meet such expense.

ARGUMENT.

I.

The Commission Was Without Statutory Authority To Grant The Application of The Carrier.

The test to be applied in abandonment cases under Section 1 (18), of the Interstate Commerce Act is whether a line of railroad should or should not be abandoned from the standpoint of the public interest as the same relates to transportation. The Commission has no jurisdiction under the statute to apply extraneous measures, such as the general public welfare involved in a flood control project.

The Appellants contend that it has been uniformly held by this Court that the yardstick by which the Commission must measure applications seeking abandonment is the determination of whether such abandonment is required for the promotion of interstate commerce or the protection thereof from an undue burden. It is the public interest which must be considered and the "public interest" relates solely to that of the transportation public. The fact that what might be regarded as a superior public interest (such as the interest of those who will be served by the construction of a flood control project) will be promoted, is a matter with which the Commission cannot lawfully concern itself. Its function and duty, in relation to applications of carriers of the character here being considered, is to pass upon such applications exclusively in the light of the effect of the granting or denying of the authority

prayed will have upon the welfare of the transportation public concerned.

The inescapable conclusion that the "public welfare" with which the Commission is concerned is confined to the transportation public, is manifest from the language of the Interstate Commerce Act, as uniformly construed by the decisions of this Court. Those decisions deal not only with the general purposes of the Act but with the specific powers of the Commission (such as to permit abandonments in proper cases) and establish the criteria by which those powers delegated to the Commission must be exercised.

As heretofore stated, the application in the instant case was filed pursuant to Section 1 (18), of Part 1 of the Interstate Commerce Act (as amended by the Transportation Act of 1920), which reads as follows:

> "No carrier by railroad * * * shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Section 1 (20), provides:

> "The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. * * *"

In Sharfman's treatise entitled, *"The Interstate Commerce Commission"*, (Volume II, at page 264) commenting

upon the Commission's power over abandonment as vested by the above sections, it is said:

> "The Commission's power over abandonments, as conferred by statute, is in its general terms co-extensive with that over new construction. The continued operation of existing lines may prove as burdensome to interstate carriers as the further extension of such lines, or undue competitive building by other carriers;—hence discontinuance of service was made dependent upon the Commission's authorization, through the issuance of certificates of public convenience and necessity. *Since this authority was conferred in the interest of fostering and protecting the transportation system as a whole* * * *". (Italics ours.)

It is clear that the purpose of the Transportation Act of 1920, particularly the paragraph in question, is to protect *interstate commerce* from undue burdens and has no relation to *collateral* matters of alleged interest to the public. In the case of *Colorado v. United States*, 271 U. S. 153, 162, Mr. Justice Brandeis in referring to the paragraphs in question, said:

> "Transportation Act 1920 did not purport to take from the state its powers to control intrastate commerce. * * * The argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under paragraphs 18-20. The certificate issues, not primarily to protect the railroad, *but to protect interstate commerce* from undue burdens or discriminations. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its Federal duty. * * * *The sole objective of paragraphs 18-20 is the regulation of interstate commerce.*" (Italics ours.)

In *New York Central Securities Corp. v. United States*, 287 U. S. 12, 24, Chief Justice Hughes in construing the

powers vested in the Commission under the Transportation Act, said:

> "Appellant insists that the delegation of authority to the Commission is invalid because the stated criterion is uncertain. That criterion is the 'public interest'. *It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations.* The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary. Going forward from a policy mainly directed to the prevention of abuses * * * Transportation Act, 1920, was designed better to assure adequacy in transportation service. This Court in *New England Divisions Case (Akron, etc. v. United States)* 261 U. S. 184, 189, adverted to that purpose, which was found to be expressed in unequivocal language; 'to attain it, new rights, new obligations, new machinery, were created.' The Court directed attention to various provisions having this effect, and to the criteria which the statute had established in referring to 'the transportation needs of the public', 'the necessity of enlarging transportation facilities', and the measures which would 'best promote the service in the interest of the public and the commerce of the people.' * * *. The provisions now before us were among the additions made by Transportation Act, 1920, *and the term 'public interest' as thus used is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities,* questions to which the Interstate Commerce Commission has constantly addressed itself in the exercise of the authority conferred. So far as constitutional delegation of authority is concerned, the question is not essentially different from that which is raised by provisions with respect to reasonableness of rates, to discrimination, and to the issue of certificates of public convenience and necessity." (Italics ours.)

In *Texas v. United States*, 292 U. S. 522, 531, Chief Justice Hughes again said:

> "The criterion to be applied by the Commission in the exercise of its authority * * * is that of the controlling public interest. And that term as used in the statute *is not a mere general reference to public welfare*, but, as shown by the context and purpose of the Act, 'has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and the best use of transportation facilities.' (Citing *New York Central Securities Corp. v. United States*, supra.) (Italics ours.)
>
> "It is in the light of this criterion that we must consider the scope of the Commission's authority * * *."

In *Schechter v. United States*, 295 U. S. 495, 539, the Chief Justice repeated:

> "By the Interstate Commerce Act, Congress has itself provided a code of laws regulating the activities of the common carriers subject to the act, in order to assure the performance of their services upon just and reasonable terms, with adequate facilities and without unjust discrimination. Congress from time to time has elaborated its requirements, as needs have been disclosed. To facilitate the application of the standards prescribed by the Act, Congress has provided an expert body. That administrative agency, in dealing with particular cases, is required to act upon notice and hearing, and its orders must be supported by findings of fact which in turn are sustained by evidence. *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88 * * * *Florida v. United States*, 282 U. S. 194 * * *. When the Commission is authorized to issue for the construction, extension or abandonment of lines, a certificate of 'public convenience and necessity', or to permit the acquisition by one carrier of the control of another, if that is found to be 'in the public interest', we have pointed out that these provi-

sions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and *can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation. New York Cent. Securities Corp. v. United States*, 287 U. S. 12, 24, * * * *Chesapeake & O. R. Co. v. United States*, 283 U. S. 35." (Italics ours.)

In *Texas v. Eastern Texas R. Co.*, 258 U. S. 204, 217, Mr. Justice Van Devanter refers to paragraphs 18, 19 and 20 of the Transportation Act in the following language:

"Being amendments of the Interstate Commerce Act, they are to be read in connection with it and with other amendments of it. *As a whole, these acts show that what is intended is to regulate interstate and foreign commerce,* and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce. * * * And had there been a purpose here to depart from the accustomed path, and to deal with intrastate commerce as such, independently of any effect on interstate and foreign commerce, it is but reasonable to believe that that purpose would have been very plainly declared. This was not done." (Italics ours.)

In *Akron, etc., v. United States*, 261 U. S. 184, 189, Mr. Justice Brandeis said:

"Transportation Act, 1920, introduced into the Federal legislation a new railroad policy. * * * Theretofore, the effort of Congress had been directed mainly to the prevention of abuses; particularly, those arising from excessive or discriminatory rates. The 1920 Act

sought to insure, also, adequate transportation service. That such was its purpose, Congress did not leave to inference. The new purpose was expressed in unequivocal language."

In the comparatively recent case of *United States v. Lowden*, 308 U. S. 225, 230, (decided December 4, 1939) involving an application in behalf of two or more carriers to merge, Mr. Justice Stone, speaking for the Court, said:

> "* * * *'public interest' in this section does not refer generally to matters of public concern apart from the public interest in the maintenance of an adequate rail transportation system;* that it is used in a more restricted sense defined by reference to the purposes of the Transportation Act of 1920, of which the section is a part and which, as had been recognized in earlier opinions of this Court, sought through the exercise of the new authority given to the Commission *to secure a more adequate and efficient transportation system.*" (Italics ours.)

The true significance, however, of the decision in the *Lowden* case results from the finding by the U. S. Supreme Court that the Commission, in passing upon applications of carriers seeking authority to consolidate, is empowered to prescribe as conditions to the approval thereof any reasonable conditions which tend to assure an adequate system of transportation in furtherance of interstate commerce. *The yardstick or measure for determining the public interest remains the interest of the transportation public.* It should be parenthetically observed that in the *Lowden* case no effort was made by the complainants to attack the sufficiency of the evidence upon which the Commission relied and indeed the record of the proceeding before the Commission was never offered in evidence in court. Mr. Justice Stone, in affirming the action of the Commission in attaching certain conditions to its order of approval relat-

ing to the treatment to be accorded the carrier's employees, said at page 231:

> "Appellees do not attack the sufficiency of the evidence on which the Commission's findings are based, and that evidence was not submitted to the district court for review. Hence we are free to disturb the findings only if we can say that there can be no rational basis for them."

In the case at bar, the Appellants assert that no substantial evidence can be gleaned from the Record that affords a lawful basis for the order of the Commission.

It thus appears from the above decisions that the jurisdiction of the Commission is strictly limited and that the "public interest" it may consider is only that of the public concerned with *transportation service* in interstate and foreign commerce, and does not include elements of public interest beyond those prescribed. Clearly the jurisdiction of the Commission does not include the power to consider the public interest involved in national flood control projects as a basis for issuing a certificate authorizing abandonment. To the contrary, it is manifest that the Commission must refuse such a certificate where, as here, the issuance thereof would operate to *deprive* the public of necessary transportation service conceded *not* to be a burden on interstate commerce.

Where it cannot be shown that (i) the service to be abandoned is a burden on interstate commerce or (ii) the convenience and necessity of *the transportation public* warrants the abandonment, the Commission is without power to grant such an abandonment, and hence a certificate issued under such circumstances is beyond the jurisdiction of the Commission.

Certificates authorizing abandonments have been issued by the Commission upon a wide variety of bases, and

numerous factors have been considered by the Commission as determinative of the existence of the requisite "public convenience and necessity".

These bases and factors are comprehensively summarized in Sharfman's *"The Interstate Commerce Commission"*, (Vol. III-A, pp. 331-348), as follows:

> "Broadly speaking, applications for abandonments are of two principal types: Those incidental to readjustments in plant and service; and those designed to relieve carriers of the burdens of unprofitable operation. The proceedings resulting from the first of these groups of applications can be disposed of very briefly. They are generally initiated for the purpose of increasing efficiency, effectuating economies, or promoting safety, and they contemplate no material diminution in the scope or quality of the service rendered to the patrons and communities involved. * * *
>
> "But in most instances carriers seek permission to abandon their lines, in whole or in part, because of the pressure of unprofitable operations; and the proposed abandonments generally evoke protest because of their probable transportation effects upon the communities being served by the existing facilities. * * *
>
> "The amount of the operating deficits, the duration of their incidence, the likelihood of their continuance, the causes of their emergence, and, where a branch is involved, the relationship which they bear to the operating results as a whole, are obviously considerations relevant to an appraisal of carrier claims; the presence or absence of any basic economic justification for the maintenance of the service, the extent to which financial support is actually accorded to it through traffic demand, the feasibility of suggested expedience for rendering it more remunerative, the probable social and industrial effects of its discontinuance, and the degree to which alternative or substitute services are available are obviously considerations relevant to an appraisal of community claims; and a final judgment as to whether public convenience and necessity permit

of the abandonment is the resultant of all such considerations, in their numerous interrelations, as they are developed in each proceeding." * * *

"While the interests of the general community, as influenced especially by the presence or absence of substitute services are uniformly held in view in connection with proposed abandonments, *the Commission is guided primarily by financial considerations.* When continued operation can result only in losses to the carrier, this very fact is deemed to be persuasive evidence that public convenience and necessity permit of the abandonment * * *. When * * * the proposed abandonment involves an unprofitable branch of a profitable system the Commission's problem becomes * * * complex. Not only is it necessary to scrutinize closely the allocation of revenues and expenses as between the owning or controlling system and the branch line, but it is rendered essential that a balance be struck between the interests of the carrier and those of the industries and communities dependent upon its service, since the ultimate economic losses incident to the abandonment might far outweigh the immediate financial gains of the proprietary system. * * * Recognizing that practically every abandonment affects adversely some interest dependent upon the service, the Commission insists that the controlling convenience and necessity is that of the general public, and that the desire for continued operation must be accompanied by a willingness to support the road through provision of a reasonably adequate flow of traffic. The virtual disappearance of demand not only produces operating losses but negatives the claim of public need. * * * Finally, the Commission is guided by the availability of adequate substitute services. Not only has the denial of applications been influenced by the absence of such substitute services, but even when certificates are issued the Commission frequently imposes conditions designed to provide satisfactory transportation facilities for the areas affected. Conversely, the case for abandonment is materially strengthened when

> alternative services are available, whether over the lines of the applicant carrier or of some other road, or merely by virtue of the existence of adequate highways over which goods can be hauled directly to market or to intermediate transport facilities. Through such processes and such expedience the conflicting claims of carriers and communities are flexibly adjusted in the public interest." (Italics ours.)

From what is expressed in the above decisions and recognized treatise, it is apparent that the principle stated by Chief Justice Hughes in *New York Central S. Corp. v. United States, supra,* where he said that "* * * the term 'public interest' as thus used (i. e., in the Transportation Act of 1920) is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities * * *" is the clearly settled doctrine and, as shown by Mr. Sharfman's discussion, has been consistently so recognized by the Commission.

The War Department, in arguing in behalf of the application before the Commission and the latter in its report dated July 31, 1941, seemingly relied upon the opinions in *Colorado v. United States, supra,* and *Transit Commission v. United States,* 284 U. S. 360, to support the conclusion that the Commission is not limited to a consideration of the interest of the *transportation public* but can consider the so called "superior public interest" affected by a flood control project. The Appellants assert that the two cases cited are not valid authorities to support the Commission's conclusion.

In the former case Mr. Justice Brandeis, speaking for the Court, held that the inherent power of a state to regulate intrastate traffic upon a railroad within its border by

requiring the railroad to operate every part of its line, is subject to the limitation that such operation cannot be required if the result is to burden the interstate operations of the road. The only question of "superior public use" there involved arose in the court's conclusion that, while the Commission must have regard to the needs of both intrastate and interstate commerce, the real objective of the Transportation Act is the regulation of interstate commerce. Hence he held that where the continued operation of an intrastate line would burden interstate commerce, such line must be abandoned. Certainly there is nothing in the opinion to indicate that the "public interest" to be considered is any interest other than that of the transportation public.

Likewise *Transit Commission v. United States*, supra, cannot logically be cited as authority to support the Commission's action in the instant case. There again the question was whether or not, in passing upon an application for the abandonment of a branch line of railroad, the Commission was bound to weigh the benefit to accrue to interstate commerce from the abandonment against the resultant prejudice and injury to intrastate commerce. The Court (Mr. Justice Roberts rendering the opinion on June 4, 1932) held that such benefits and injuries must be weighed and then found that "there is no contradition of the fact that the branch is operating at a serious loss—and that this will continue and increase from year to year and be aggravated by expenditures for the removal of grade crossings." It is manifest from the opinion that the abandonment was there approved because a continuance of the operation of the line in question would have constituted a burden upon interstate commerce.

Counsel for the Appellees in the instant case argued below that the decision in *Woodruff v. United States, et al.*,

40 F. Supp., 949 decided August 29, 1941 by a three-judge-court sitting in the United States Court for the District of Connecticut, is authority (a) to support the Commission's conclusion in the instant case and (b) for the proposition that a shipper injured by an abandonment has no cause of action against the Carrier under the principle of *damnum absque injuria.*

The last mentioned case bears no factual relationship to the one at Bar, as will appear from an analysis of the opinion. Alternate transportation facilities were available to the shippers there affected by the abandonment and a further continuance of operation of the branch line in question would not "earn the bare out of pocket cost of operation and will contribute nothing toward the fixed charges and overhead of the system." Hence the Court held that such line "unless abandoned would constitute a positive drain upon the resources of the system with its interstate ramifications."

With respect to the suggestion that the doctrine *damnum absque injuria* is applicable to the Appellants in the instant case, it is sufficient to say that such doctrine cannot apply when one's property is being irreparably injured or destroyed by an order of an administrative agency entered without statutory authority and in direct contravention of the duty imposed by law upon such agency. Whatever may be the rights of a shipper who suffers financial loss or destruction of property as the result of the abandonment of a line of railroad pursuant to a *lawful* order, certainly it will not be contended that the innocent victim of an *unlawful* order of the Commission cannot be accorded relief in a court of law. Finally, in considering the application here of the decision in *Woodruff v. United States*, *supra*, it should be observed that the Appellant, the Public

Service Commission of Maryland, is specifically empowered by statute to institute proceedings for a judicial review of an order such as the one involved here. Section 1 (20) of Part 1 of the Interstate Commerce Act:

Still another case upon which the Appellees here rely is that of *Railway Labor Executives' Association v. United States*, 38 F. Supp. 818, decided March 6, 1941. There a three-judge-court sitting in the United States Court for the District of Columbia held that the Commission, in approving an application for abandonment, could prescribe conditions relating to treatment to be accorded the carrier's employees. The Commission had refused to entertain an application by certain displaced employees seeking protection, insisting it was without statutory authority to do so. The Court held that the public convenience and necessity which must be served embraced a consideration of the petitioning employees, since the treatment extended such employees could readily have some impact upon the transportation system involved in the proceedings. It is manifest from an examination of the opinion that the Court was merely extending the doctrine applied in *United States v. Lowden, supra*, in relation to mergers to cases relating to abandonment. Here again there was no charge of insufficiency of evidence to support the order. The Commission had refused to receive evidence proffered by the employees concerned and the case was remanded for that purpose. Certainly there is nothing in the opinion that affords the basis for a sound argument that the accepted conception of "public interest" was changed or modified.

Having in mind the fact that, in the instant case, the application for abandonment on its face disclosed that the same was filed "solely at the behest of the War Department" in furtherance of a flood control project and that the line in question was a profitable one serving a neces-

sary public purpose, it is submitted that the Commission was without jurisdiction to entertain the same or issue the certificate of abandonment.

A.

The Commission was without jurisdiction to permit an abandonment upon the grounds stated in the application.

The application filed by the Carrier contained the following answer in response to the question therein as to the reasons why the abandonment should be authorized:

> "The United States Government proposes to construct a flood control dam on the Youghiogheny River about three miles above Confluence, Pa., which will back the water up the stream for about fourteen miles, and will require the abandonment of the Confluence and Oakland Railroad's entire line because it will be submerged for a distance of approximately twelve of its 19.79 miles. The remainder of the line will become a detached segment without rail connection with operator or any other railroad thus rendering it valueless from an operating and traffic standpoint. To relocate the line proposed to be abandoned would cost at least $2,000,000, an expenditure that is not justified from the present and prospective revenue producing standpoint and would constitute an undue burden on interstate commerce without compensating advantage. A copy of the proposed option to the United States of America covering the purchase of the property affected by construction of the Dam is filed herewith and made a part of this application." (See p. 6 of Plaintiffs' Exhibit A).

In the return to questionnaire and the amended return to questionnaire, subsequently filed by the Carrier, it was stated that the community of Friendsville "is almost wholly dependent upon the line for service." (See p. 24 of Plaintiffs' Exhibit A).

The questionnaire also asks the question: "State what effort has been made to dispose of the line so as to insure its continued operation, and what, if any, transportation service will remain or may be substituted for that proposed to be discontinued?" Both returns to the questionnaire responded to this question as follows:

> "A. Applicants are seeking authority to abandon the line at the behest of the United States Government which, in furtherance of its plans for Flood Control, proposes to build a dam near Confluence, Pa., which will submerge about two-thirds of applicants' line between Confluence and Oakland Junction, Pa., and Kendall, Md., rendering the lower end of the line a detached segment without rail connection with operator or other railroads and therefore valueless from a traffic producing standpoint." (See p. 29 of Plaintiffs' Exhibit A).

Both returns also give as a summary statement of the reasons for the application the following explanation:

> "Applicants assume that the United States Government has concluded that the greater public interest and welfare requires the construction of a dam on the Youghiogheny River near Confluence, Pa., and the consequent submerging of a greater part of, and the abandonment of all, of applicants' railroad between Confluence and Oakland Junction, Pa., and Kendall, Md., is superior to any local interest that may be affected. The cost of relocating this line would be too great for the traffic offered and would constitute an undue burden on interstate commerce and therefore would not be in the public interest." (See p. 29 of Plaintiffs' Exhibit A).

It is manifest from the decisions of this Court hereinbefore cited and quoted that such reasons as were alleged by the Carrier in its application and return to questionnaire are not sufficient to invoke the jurisdiction of the

Commission to order an abandonment of the line of railroad. The application plainly asserts that (i) it was filed solely at the behest of the War Department in order to facilitate a flood control project (ii) the Carrier merely *assumed* that the United States Government had concluded that the greater public interest and welfare require the construction of the dam and (iii) the interest served by the project is superior to any local interest that may be affected by the abandonment.

But this is not all. The application clearly shows that the line in question has over a period of years been producing a net profit to the Baltimore & Ohio Railroad (R. p. 24).

It follows that, since the application and returned questionnaire disclosed on their face that the sole reason for the abandonment was the flood control project, the application should have been denied forthwith by the Commission because of lack of jurisdiction to grant an abandonment on such ground.

B.

The Order of the Commission Is Not Based Upon Substantial Evidence.

It has long been the settled law of the land that orders of a regulatory commission of the character here involved must be supported by substantial evidence and that such orders cannot be validly supported by considerations which could not legally influence its judgment.

Minnesota Rate Cases, 230 U. S. 352.
United States v. Abilene & So. Ry., 265 U. S. 274.
Southern Pac. Ry. v. I. C. C., 219 U. S. 433.
Ann Arbor R. Co. v. U. S., 281 U. S. 658.
Ohio Utilities Co. v. Ohio Public Utilities Commission, 267 U. S. 359.
West Ohio Gas Co. v. Ohio Public Utilities Commission, 294 U. S. 64.

The Appellants earnestly submit that there was no substantial evidence to support the order here complained of and that, on the contrary, the only evidence offered in support of the issuance of the certificate was of a nature that (i) clearly established that the line of railroad in question was serving a necessary public purpose and operated at a profit or (ii) related to the alleged superior public interest to be served by the construction of the proposed flood control project. The latter evidence does not form a legal basis for the relief prayed by the Carrier and should not, as a matter of law, have been admitted by the Examiner or considered by the Commission over the objection of the Appellants.

That any order of the Commission, in the exercise of its delegated discretionary power, must be supported by substantial evidence is elementary and references to the following extracts from four of the decisions of this Court are conclusive on this point. In *Baltimore & Ohio Railroad Co. v. United States*, 264 U. S. 258, where the Commission was concerned with an application for the acquisition by one carrier of all of the capital stock of another and a lease of certain terminal properties, Mr. Justice Brandeis, at page 264, said:

> "It is further contended that Paragraph 2 of §5 confers a power purely discretionary, and that, for this reason, the order entered cannot be set aside by a court merely on the ground that the action taken was based on facts erroneously assumed, or of which there was no evidence. The power here challenged is not of that character. Congress by using the phrase 'whenever the Commission is of opinion, after hearing,' prescribed quasi-judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hear-

ing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs."

In the earlier case of *Interstate Commerce Commission v. Union Pac. R. Co.*, 222 U. S. 541, the Court, at page 547, said:

"In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. 'The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience.' Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700. Its conclusion, of course, is subject to review, but, when supported by evidence is accepted as final; not that its decision, involving as it does so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order."

In *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U. S. 88, the Court, at page 91, in setting aside an order of the Commission said:

"But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in

accordance with the facts proved. A *finding without evidence is arbitrary and baseless.* And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another; is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

"In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence' (Tang Tun v. Edsell, 223 U. S. 681, 56 L. ed. 610, 32 Sup. Ct. Rep. 359; Chin Yow v. United States, 208 U. S. 13, 52 L. ed. 370, 28 Sup. Ct. Rep. 201; Low Wah Suey v. Backus, 225 U. S. 468, 56 L. ed. 1167, 32 Sup. Ct. Rep. 734; Zakonaite v. Wolf, 226 U. S. 272, ante, 218, 33 Sup. Ct. Rep. 31), or if the facts found do not, as a matter of law, support the order made (United States v. Baltimore & O. S. W. R. Co., 226 U. S. 14, ante, 104, 33 Sup. Ct. Rep. 5, Cf. Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 20, 51 L. ed. 942, 27 Sup. Ct. Rep. 585; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 301, 45 L. ed. 201, 21 Sup. Ct. Rep. 115; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U. S. 510, 56 L. ed. 863, 32 Sup. Ct. Rep. 535; Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 470, 54 L. ed. 287, 30 Sup. Ct. Rep. 155; Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433, 55 L. ed. 283, 31 Sup. Ct. Rep. 288; Muser v. Magone, 155 U. S. 247, 39 L. ed. 137, 15 Sup. Ct. Rep. 77)."

The last quoted opinion was cited very recently by Chief Justice Hughes in *Schechter v. United States*, 295 U. S. 495, 540, wherein, after quoting the same with approval, he said:

> "When the Commission is authorized to issue, for the construction, extension or abandonment of lines, a certificate of 'public convenience and necessity', or to permit the acquisition by one carrier of the control of another, if that is found to be 'in the public interest', we have pointed out that these provisions are not left without standards to guide determination. The authority conferred has direct relation to the standards prescribed for the service of common carriers and *can be exercised only upon findings, based upon evidence, with respect to particular conditions of transportation.* New York Cent. Securities Corp. v. United States, 287 U. S. 12, * * * Chesapeake & O. R. Co. v. United States, 283 U. S. 35." (Italics ours.)

It being manifest from the above enunciated principles, repeated in many other decisions, that a valid order of the Commission must be based upon substantial evidence *"with respect to particular conditions of transportation"*, it is pertinent to summarize briefly the evidence adduced in support of the Carrier's application. That evidence is confined to testimony and exhibits relating to (i) the necessity of the service furnished by the Carrier (ii) the revenues and expenses of the line in question (iii) the purported superior public benefit of the flood control project, and (iv) the cost of relocating the line.

The Necessity for the Service.

In its application for abandonment the Carrier stated that the community of Friendsville is "almost wholly dependent" upon the service by the Carrier.

It is apparent from the Record that the service of the Carrier afforded over the line proposed to be abandoned is

confined to two mixed trains weekly in each direction (R. p. 22). This service constitutes the only rail service available to the shippers and public residing in the community of Friendsville and is likewise the only possible means of transportation whereby the large weekly shipments of McCullough Coal Corporation can be transported (R. pp. 22, 26).

It is equally clear from the admission found in the Report of the Commission that there is no substitute transportation service available to McCullough Coal Corporation, in the event the line is abandoned. It is therein conceded that the coal company could not ship its coal by trucks in competition with other mines having a direct rail service available because the increased cost resulting from such movement and the losses in transit would be excessive (R. p. 26).

Likewise it is uncontradicted in the Record, that McCullough Coal Corporation has been operating its mines for twenty years, has a presently recoverable marketable tonnage in excess of 6,000,000 net tons of coal of an estimated value of $218,000 and that the plant, equipment and properties of the corporation are such that it is prepared to continue in business for many years in the future.

The abandonment of the rail service would clearly bring about the economic destruction of the coal company and, in turn, threaten that of the entire community of Friendsville. It is uncontradicted in the Record that the majority of the inhabitants of the community are dependent for their means of support upon a continuance of the mining operations of McCullough Coal Corporation and, hence, a cessation of such operations would add considerably to the existing public relief rolls in the community.

The Appellant, the Public Service Commission of Maryland, is now and has at all times been a party to these proceedings because it recognizes the disaster that will be visited upon that community if abandonment of the line is permitted.

The Revenues and Expenses of the Line.

It was affirmatively stated by the Carrier, in answers to the questionnaire of the Commission, that the branch line in question had operated at a profit for the calendar year 1939 and it was admitted by the witness A. C. Clarke, Assistant Chief Engineer of the Carrier, that the line has been continuously and is now operating at a substantial profit. Testimony of Mr. Clarke in that respect is found beginning at page 88 of Plaintiffs' Exhibit A and is as follows:

"Q. (By Mr. Miles) Mr. Clarke, in your opinion would this applicant have filed an application to abandon this line had it not been for the desire of the Government to take over the portion of it that they contemplated in connection with the Youghiogheny Dam and Reservoir project? A. Will you read that question?

(Mr. Miles) Read it.

Q. (Question read.) A. I don't think so.

Q. In other words, you do not believe that this applicant would have filed an application to abandon this service for any other reason? A. That is my opinion, my personal opinion, yes.

Q. Now, did I understand, from your direct examination, that you negotiated the sales price or the option price with the Government? A. Yes, sir.

Q. Would you mind stating to us, what was the basis of the price upon which you ultimately agreed? I mean, what were the factors that were considered in arriving at the sum of approximately $306,000? A. It was on a capitalized income basis.

Q. On a capitalized income basis; and what was the basis of the capitalization, what was the accounting formula that you adopted for the purpose of arriving at the capitalized figure? A. We took the revenues or the calculated revenues on the branch for a nine-year period, and we took the actual expenses on the branch for the same period and arrived at a gross earnings on the branch. To the expenses of handling or producing that gross earning, the difference between them being the net, we divided the cost of handling that business on the system to its point of destination or from its point of destination and arrived at the net earnings for the branch, with all expenses deducted for handling the business, excluding taxes, and so forth, and capitalized that to arrive at the price for the line.

Q. I am not sure that I understand your use of the word 'gross' and 'net'. Do I understand that the analysis that you made, which formed the basis of the figure which you capitalized, showed that this branch had net revenues for that period of nine years? A. Yes, sir, it did show that it had that revenue."

Mr. Clarke subsequently, at the request of Examiner Molster, prepared and filed in the Record a detailed statement setting forth the basis adopted by the Carrier and the War Department for the purpose of arriving at the option price. This statement asserts that over the nine year period from 1930 to 1938, inclusive, the average annual net income derived from the operation of the line in question was $19,798. It is significant, however, to observe that the last mentioned figure results from the application to the gross income (i. e. revenues less expenses) of an operating ratio of 50.0, whereas Mr. Clarke in the same statement, further asserts (p. 466 Plaintiffs' Exhibit A) that:

"It was my conclusion that a fair operating ratio to apply * * * would be about 40.0 and that it might reasonably be placed as low as 37.5."

Mr. Clarke, however, acquiesced, by way of compromise, in the application of the ratio of 50.0 in fixing the option price. On the other hand, Mr. Rodenbaugh, a railway executive of long and successful experience and a witness for the Appellants, insisted that the proper operating ratio to be applied was 25.0. The application of either the last mentioned ratio or that urged by Mr. Clarke (40.0 or 37.5) would result in a higher annual net income than was finally used as the basis for the option price. The inescapable and paramount point of the discussion, however, is that Mr. Clarke, the War Department and Mr. Rodenbaugh all agreed that the Carrier operated at a profit and the only question in dispute was as to the amount of that profit.

Thus, in the light of (i) the answers of the Carrier to the questionnaires of the Commission (ii) the testimony of Mr. Clarke (iii) the subsequent detailed written statement of Mr. Clarke (iv) the testimony of Mr. Rodenbaugh and (v) the admission of the representatives of the War Department, it is indisputable, nor is it contended otherwise, that the Commission was here concerned not with the application of a carrier seeking to be relieved from a burden upon interstate commerce but with one seeking to abandon an admittedly profitable operation serving an essential public purpose, solely in furtherance of the construction of a flood control project.

The Purported Superior Public Benefit of the Flood Control Project.

The Appellants further earnestly urge that, in the light of the record and the numerous authorities above cited, the only *relevant* evidence before the Commission was that which related to whether the continued operation of the line in question is necessary in the interest of the transportation public. Appellants further assert that any and all evidence in the record which related to the alleged

public benefit to be served by the construction of the flood control project is irrelevant and could not form a lawful basis for the granting of the certificate issued to the Carrier. Appellants, therefore, see no purpose to be served by discussion herein of the purported merits of that project other than to comment that there is no evidence its construction will serve any purpose with respect to the needs of the transportation public involved. To the contrary it will destroy an existing service which is admittedly both profitable and essential.

Indeed, the Appellants are unable to find any authority in the reported cases that constitutes a precedent for the Commission's action here. It is true that in *United States Feldspar Corporation v. United States*, 38 Fed. (2d) 91 (1930), the Commission was concerned with an application for abandonment which apparently had been influenced by a proposed flood control project. But it is manifest from an analysis of the opinion there that the evidence before the Commission established that (a) there were adequate motor truck lines available as a substitute transportation service, (b) the railroad line in question had been "gradually dying economically" and (c) the continuation of the service would have been burdensome to the carrier. In addition to such evidence, to which the court specifically referred in its opinion, it is further apparent therefrom that the line in question had actually been condemned in appropriate proceedings instituted by an agency of the State of New York. It should be observed that in the condemnation proceedings, damages had been awarded in an amount sufficient to defray the cost of relocating the line, in the event that the Commission determined that the public necessity and convenience required the continuance of its operation. It is nowhere suggested in the opinion that the particular line was profitable, served the public

necessity and convenience or constituted the sole available means of transportation to the shippers served by it. Hence an examination of the opinion in the last mentioned case, in relation to the facts there presented, is persuasive of the conclusion that it affords no precedent for the relief sought by the Carrier in the instant case. To the contrary, it is authority for the position of the Plaintiffs here adopted —that the criterion by which applications for abandonment must be determined is the necessity and convenience of the transportation public concerned.

It should be noted that the District Court in the case at bar did not pass upon the competency of the evidence before the Commission dealing with the purported superior public use involved in the flood control project. Neither did the District Court question the evidence before the Commission as to the necessity for the railroad service nor as to the profitable operation of the line. In this respect, the District Court said (R. p. 48):

> "It is not necessary in this case to decide in which of the Commission's opinions (i. e., the majority or the minority*) the extent of its authority is more correctly defined. It is true that Congress has given the power to other agencies to decide whether a flood control project that will interfere with the operation of a railroad shall be built; and that in a number of decisions the Supreme Court has held that the criterion to be applied by the Commission in the exercise of its authority is not the general public welfare, but 'The adequacy of transportation service in its essential conditions of economy and efficiency, and to the appropriate provision and best use of transportation facilities.' New York Central Securities Co. v. United States, 287 U. S. 12, 24; see also Colorado v. United States, 271 U. S. 153; Texas v. United States, 292 U. S. 522; United States v. Lowden, 308 U. S. 225."

* Explanation ours.

The refusal of the District Court to consider the paramount issue as to the jurisdiction of the Commission to order an abandonment because of a flood control project where the line is shown to be a necessary one operating at a profit, is all the more remarkable in view of the fact that the three reports or decisions prior to the opinion of the District Court (i. e. the reports of the Examiner, the majority and the minority of the Commission) had all been primarily concerned with this issue.

Obviously the primary issue in the case is whether, under the Interstate Commerce Act, Section 1 (18), the jurisdiction of the Commission is confined to the public interest as it relates to transportation or permits the Commissioner to go beyond such limits and pass upon the purported general public interest involved in the Flood Control Act. Under the many decisions of this Court, hereinbefore cited and discussed, the Appellants submit that the jurisdiction of the Commission is limited to a determination of the public interest as it relates to transportation. As Chairman Eastman said:

> "This Commission has no authority to go outside the field of transportation and pass judgment upon the question whether lines of railroad which are not an undue burden upon interstate commerce should be abandoned because a superior public interest demands that they make way for a public improvement such as the flood control program here involved."

II.

The Commission's Findings with Respect to the Question of Relocation Were Contrary to Law.

It is hence asserted that, in the light of what has been heretofore argued and the authorities cited in support of the same, the Commission could not validly pass upon the question of relocation since it was without authority to authorize the abandonment of the existing line.

Assuming, however, that the Commission acted within its power in considering and acting upon the question of relocation, it is further submitted that its findings with respect thereto were contrary to law and that its order should hence be set aside.

In the Report of the Commission, it adopted the findings and conclusions of Division 4, among which were the following:

> "Whether a substitute line should be provided, *regardless of whether the cost of relocating is paid by the applicants or by the War Department*, is doubtful in the light of the traffic handled during the past 6 years and what may be handled in the future. Even at the low operating cost urged by the coal company the net system profits annually since 1934 would not have been sufficient to *produce a reasonable return upon an investment as low as $800,000*. The inclusion of the estimated increase in maintenance costs would diminish the rate of return still more. We are of the opinion that the same consideration must be given to the proposed expenditure of public funds for relocating the line that would be given if the railroad were to bear the expense. If public funds are to be used to protect the coal company from loss caused as a result of the national flood-control program this should be done directly and not by means of uneconomic expenditures in railroad construction and maintenance." (p. 478 of Plaintiffs' Exhibit A). (Italics ours.)

A.

The Commission Erred in Its Finding That the Carrier Would Be Entitled to Earn a Return Upon the Investment in the Cost of Relocation, Regardless of the Source of the Funds Defraying Such Cost.

The last quoted conclusion of the Commission constitutes a finding that the Carrier should be entitled to earn a reasonable return upon the amount expended to relocate

the line, even if such amount was paid from public funds. That is to say, assuming that the Secretary of War should conclude to defray the cost of relocating the line as a part of the cost of the flood-control project, and hence such line would be constructed with donated capital, the Commission holds that the Carrier would be entitled to a return thereon. This, it is respectfully submitted, is contrary to the trend of the authorities.

A carrier or other public utility is entitled to earn a fair return upon the fair value of its property devoted to the public service. Where possession of such property results from a public grant, however, it should not be included as a part of the utility's rate base, although the costs of maintaining and operating service by means of such property constitute expenses which must be considered in a determination of the allowable income to which such carrier or utility is entitled.

This Court has apparently not passed directly upon the question but the overwhelming weight of authority supports the contention that a utility is *not* entitled to claim a return on contributed or donated capital. Thus, regulatory bodies of the following jurisdictions have held that donated property is not properly included in the rate base of a utility and that a utility is not permitted to earn a return thereon: Pennsylvania, Wisconsin, Michigan, New York, Ohio, Virginia, Washington, West Virginia, California, Illinois, Indiana, Missouri, Nevada, New Jersey, North Dakota, Rhode Island and Utah.

See also *Wisconsin Hydro Electric Company v. Railroad Commission*, 208 Wis. 348; *Sutter Butte Canal Co. v. Railroad Commission*, 202 Calif. 179; *Public Utility Commission v. East Providence Water Company*, 48 R. I. 376.

In the instant case, however, the Commission has apparently decided, *as a matter of law*, that a relocation of the line in question cannot be required unless the Carrier would earn a return thereon regardless of the source of the funds from which the cost of relocation would be defrayed. Such a conclusion, it is earnestly urged, not only is repugnant to the law of fair value and return thereon but ignores the expressed intention of Congress as contained in legislation dealing with the subject of flood control.

Reference to the Flood Control Act, as approved on June 22, 1936 and amended June 28, 1938, clearly indicates that it was the intent of the Congress to provide that the War Department should relocate existing public utilities and highways where flooding of the same was necessitated by the construction of such a project. The pertinent provisions of the congressional enactment, 53 Stat., 1415 (33 U. S. C. A. 701c—1), read as follows:

> "In case of any dam and reservoir project, or channel improvement or channel rectification project for flood control, herein authorized or heretofore authorized by the Act of June 22, 1936, as amended, and by the Act of May 15, 1928, as amended by the Act of June 15, 1936, as amended, title to all lands, easements, and rights-of-way for such project shall be acquired by the United States or by States, political subdivisions thereof or other responsible local agencies and conveyed to the United States, and provisions (a), (b), and (c) of section 701c of this title shall not apply thereto. Notwithstanding any restrictions, limitations, or requirement of prior consent provided by any other Act, the Secretary of War *is hereby authorized and directed to acquire in the name of the United States title to all lands, easements, and rights-of-way necessary for any dam and reservoir project or channel improvement or channel rectification project for flood control,* with funds heretofore or hereafter appropriated or made available for such projects, and States,

political subdivisions thereof, or other responsible local agencies, shall be granted and reimbursed, from such funds, sums equivalent to actual expenditures deemed reasonable by the Secretary of War and the Chief of Engineers and made by them in acquiring lands, easements, and rights-of-way for any dam and reservoir, project, or any channel improvement or channel rectification project for flood control heretofore or herein authorized: *Provided*, That no reimbursement shall be made for any indirect or speculative damages: *Provided further, That lands, easements and rights-of-way shall include* lands on which dams, reservoirs, channel improvements, and channel rectifications are located; *lands or flowage rights in reservoirs and highway, railway, and utility relocation.* * * * (Italics ours.)

It is earnestly urged that the above language provides the means for relocating the line of the Carrier, in the event that abandonment of its line is necessitated in order to facilitate construction of the flood control project in question. The Congress has provided a procedure to be followed where the Secretary of War finds it necessary to acquire a railroad performing an essential transportation service and that is through the medium of purchase or condemnation, with an allowance to be made for the necessary cost of relocation. That procedure, if followed here, would have obviated the present proceedings which are, in essence, an effort to bring about the abandonment of an admittedly essential railroad without making any provision for its relocation.

It may be argued that the power vested in the Secretary of War by the Flood Control Act to relocate an existing *necessary* railroad is permissive and not mandatory. But, in either event, it would appear inescapable that the Commission could not properly pass upon the question of relocation until there had been a determination as to

who would defray the expense thereof. Clearly if such cost is to be borne by the Government, the proceeds advanced constitute donated capital upon which the Carrier would not be entitled to earn a return.

B.

The Commission Erred in Holding That the Carrier Would Be Entitled to Earn a Return Upon an Investment by It in the Cost of Relocation.

Assuming, however, that the Carrier was required to relocate the line with *its own funds*, it is submitted that it would not necessarily be allowed to earn a return on such investment.

It must be borne in mind that the line in question is a branch of a large and, so far as the record in the instant case discloses, a profitable system. The true test then is whether the line is presently or likely to become in the future a burden upon the system, and the Commission has answered that inquiry in the following language:

> "There is no evidence that the line involved herein has heretofore been a burden on the system or that the volume of traffic last reported would not continue to support it in the future if it remained undisturbed." (R. p. 28.)

The principle that the entire revenues of a given system must be taken into account and not merely the direct return from the branch line itself, is supported by the overwhelming weight of authority.

In *Colorado v. United States, supra*, this Court, speaking through Mr. Justice Brandeis, held that the Commission may authorize a carrier to cease the operation of a branch, if the losses resulting from such operations would burden the interstate operations of the road. The Court (271 U. S.

153 at 160, 162, and 163) in referring to the action of the Commission therein, said:

> "The certificate was granted on the ground that the local conditions are such that public convenience and necessity do not require continued operation; that for years operation of the branch had resulted in large deficits; that future operation would likewise result in large deficits; that the operating results of the branch are reflected in the company's accounts; that it would have to make good the deficits incurred in operating the branch; and that thus continued operation would constitute an undue burden upon interstate commerce. Re Abandonment of Branch Line by Colorado & S. R. Co., 72 Inters. Com. Rep. 315, 82 Inters. Com. Rep. 310; 86 Inters. Com. Rep. 393. * * * *The certificate issues not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discriminations.* The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its Federal duty." (Italics ours.)

It is patent from an examination of the above decision that the test for abandonment purposes is not whether the carrier is earning a return on its investment in the branch line but whether to require its continuance in service would be prejudicial to the interests of the system of which it is a part and, hence, a burden upon interstate commerce.

In *Transit Commission v. U. S.*, 284 U. S. 360 at 369, this Court in reviewing a decision of the Commission authorizing an abandonment and speaking through Mr. Justice Roberts said:

> There is no contradiction of the fact that the branch is operating at a serious loss, as shown by the carrier's accounts offered in evidence, and that this will continue and increase from year to year and be aggravated by expenditures for the removal of grade crossings." * * *

and after reconciling the decision with that in *Colorado v. U. S.*, supra, further said:

> "The Court there held that in the issuance of a certificate of public convenience and necessity the Commission need not determine with mathematical exactness the extent of the burden imposed upon interstate commerce by the operation of a branch line; that such burden might involve various elements, and that if upon the whole proof the conclusion was warranted that continued operation would in fact unreasonably burden the interstate commerce of the carrier, the Commission was justified in authorizing abandonment."

It is appropriate to parenthetically observe at this point that the Commission, in the case at bar, has authorized the abandonment without *any* evidence as to the operating results of the system as a whole and prior to *any* determination as to whether the funds required to defray the cost of relocation will be those of the Carrier's or derived from some other source.

In *Fort Smith Light & Traction Co. v. Borland*, 267 U. S. 330, 332, Mr. Justice Brandeis again said:

> "The fact that the company must make a large expenditure in relaying its tracks does not render the order void. Nor does the expected deficit from operation affect its validity. A railway may be compelled to continue the service of a branch or part of a line, although the operation involves a loss. *Missouri P. R. Co. v. Kansas ex rel. Taylor*, 216 U. S. 262, 279, 54 L. ed 472, 479, 30 Sup. Ct. Rep. 330; *Chesapeake & Ohio Railroad Co. v. Public Service Commission*, 242 U. S. 603, 607, 61 L. ed. 520, 532, 37 Sup. Ct. Rep. 234." (Italics ours.)

In *Chesapeake & Ohio Railroad Co. v. Public Service Commission*, 242 U. S. 603, 607, this Court held:

> "'One of the duties of a railroad company doing business as a common carrier is that of providing rea-

sonably adequate facilities for serving the public. This duty arises out of the acceptance and enjoyment of the powers and privileges granted by the state, and endures so long as they are retained. It represents a part of what the company undertakes to do in return for them, and its performance cannot be avoided merely because it will be attended by some pecuniary loss. * * * That there will be such a loss is, of course, a circumstance to be considered in passing upon the reasonableness of the order, *but it is not the only one.* The nature and extent of the carrier's business, its productiveness, the character of service required, the public need for it, and its effect upon the service already being rendered, are also to be considered.'" (Italics ours.)

In *State v. Georgia Southern & Florida Railway Co.*, 190 So. 527, the Supreme Court of Florida, citing numerous decisions of this Court, held:

"However, it is clear that the duty to furnish reasonably adequate train service to local communities served by such carrier, is essentially among the imperative duties that are by law imposed upon railroad common carriers in consideration of the privileges conferred upon them by the State for the benefit of the public. But the asserted requirements for adequate train service are subject to judicial determination, and must be reasonable for the public needs and not so unduly burdensome to the carrier as to operate as an unlawful deprivation of property without due process of law or as an unlawful taking of property for public purposes without just compensation. Each case should be determined by a fair consideration of all the pertinent facts affecting the rights of the public, the duty of the carrier with the burden to the carrier and the reasonable needs of the public. In particular cases *the cost of the service may exceed the receipts therefrom, but this may not control if it does not unduly affect the receipts from the entire railroad system* of the company, or impair organic rights or directly and

unreasonably burden or impede interstate or foreign commerce. See *Chesapeake & Ohio R. Co. v. Public Service Comm.*, 242 U. S. 603, 37 S. Ct. 234, 61 L. ed. 520; 51 *C. J.* 969-972; *Atlantic Coast Line R. Co. v. North Carolina Corp. Comm.*, 206 U. S. 1, 27 S. Ct. 585, 51 L. ed. 933, 11 Ann. Cas. 398; *Missouri Pac. R. Co. v. Kansas*, 216 U. S. 262, 30 S. Ct. 330, 54 L. ed. 472; *State of Washington ex rel. Oregon R. & N. Co. v. Fairchild*, 224 U. S. 510, 32 S. Ct. 535, 56 L. ed. 863; *Chicago, B. & Q. R. Co. v. Railroad Comm. of Wisconsin*, 237 U. S. 220, 35 S. Ct. 560, 59 L. ed. 926." (Italics ours.)

Also, in *Chicago, B. & Q. Railroad Co. v. Oglesby*, 198 Fed. 153, 157, the court said:

"It is also true that the *mere fact* that the income from the expenditure at a particular point upon a railroad may not earn a fair return upon the capital invested at that point *is not conclusive* in determining the reasonableness of an order of a railroad commission requiring such an improvement." (Italics ours.)

The Illinois Commerce Commission in the decision of *In re Wheelock*, 6 Ill. C. C. R. 181, held as follows:

"'The law is well settled, not only by the supreme court of the state of Illinois but by the Supreme Court of the United States, that while a public utility cannot be made to continue operating as such where its operations fail to yield a fair return, no public utility will be permitted to abandon a part or portion of its utility business merely because such a part or portion can only be continued to be operated at a loss. The right to cease doing business because unprofitable extends only to the utility as a whole, and does not embrace the right of cessation as to a part only unless the continued operation of that part or portion so depletes the revenues of the company as to render the operation of the whole confiscatory. *People ex rel. Cantrell v. St. Louis, A. & T. R. R. Co.* (1898) 176 Ill. 512, 529, 530, 52 N. E. 292; *Chicago Union Traction Co. v. Chicago* (1902) 199 Ill. 679, 647, 65 N. E. 470; *Northern*

Illinois Light & Traction Co. v. Commerce Commission ex rel. Ottaws, 302 Ill. 11, P. U. R. 1922E, 690, 134 N. E. 142; *Missouri P. R. Co. v. Kansas ex rel. Taylor* (1910) 216 U. S. 262, 54 L. ed. 472, 479, 30 S. Ct. 330; *Ft. Smith Light & Traction Co. v. Bourland*, 267 U. S. 330, 69 L. ed. 631, 633, P. U. R. 1925C, 604, 45 S. Ct. 249.'" (Italics ours.)

See also annotation of authorities to same effect in 123 A. L. R. 922.

In the instant case there is not a scintilla of evidence to suggest that the Carrier would operate at a loss over any one of the three proposed relocated routes. To the contrary, the evidence is that the Carrier's revenues would be more than sufficient to defray its expense of operating and maintaining such a relocated line. Reference to the findings of the Commission (R. p. 24) discloses that the net system profits from the traffic of the line in question, assuming that the system cost of handling traffic originating on or destined to points on the line amounted to 50% of the revenues therefrom, would have been $23,079 for the calendar year 1939. Using a 25% operating factor, urged by the Appellants to be more representative of the actual cost of handling line traffic over the system, such profit would have been $39,463 (R. p. 24).

Even assuming a normal increase in the cost of operating and maintaining a relocated line over that of the existing line in the sum of $8,000 annually, as contended by the Carrier (R. pp. 25-26), it arithmetically follows that the Carrier would have operated at a profit for the year 1939, no matter which of the two suggested operating factors is adopted.

Furthermore, the Commission found that the Carrier's system profit has been increasing annually for the past five years and, in the light of the present National Defense

Program and the great demand for coal resulting therefrom, it seems patent that its revenues derived from the line in question will continue to increase for a considerable period of time in the future.

It is submitted, therefore, that the evidence is uncontradicted that the Carrier is earning a sufficient amount from the line in question to defray the cost of operating and maintaining a relocated line along any of the three proposed routes. It follows that, in the absence of any evidence that such an operation would constitute a burden upon the system, or would in anywise prejudicially affect interstate commerce, a relocation is required, *if the present line is to be abandoned.*

CONCLUSION.

An examination and consideration of the Report of the Commission discloses manifest errors of law.

1. The jurisdiction of the Commission, under the statute pursuant to which it acted, is limited to measuring the application for abandonment by the interest of the transportation public. The test of jurisdiction was clearly expressed by Chairman Eastman in the following language appearing in his dissenting opinion:

> "In the second place, our authority under Section 1 (18) is to determine whether lines of railroad should or should not be abandoned from the standpoint of the public interest as it relates to transportation. The power plainly was given us for the purpose of protecting the public against abandonments which cannot be justified from that standpoint, and at the same time to lend specific governmental sanction to the abandonment of lines which are shown to be an undue burden upon Interstate Commerce. * * * This Commission has no authority to go outside the field of transportation and pass judgment upon the question whether lines of railroad which are not an undue burden upon

interstate commerce should be abandoned because a superior public interest demands that they make way for a public improvement such as the flood-control program here involved. Other statutes which we do not administer provide for a determination of that question in an orderly manner and in accordance with the rules which relate to such determinations." (R. pp. 36-37).

In the instant case, however, the Commission has completely ignored the yardstick by which it is required to measure applications for abandonment and has granted the certificate despite its conclusion that:

> "There is no evidence that the line involved herein has heretofore been a burden on the system or that the volume of traffic last reported would not continue to transport it in the future if it remained undisturbed." (R. p. 34).

2. The Commission was without authority to pass upon the question of relocation until there had been a determination of whether the Secretary of War or the Carrier would defray the cost thereof and a *subsequent* finding, after hearing, with respect to numerous other relevant facts, such as (i) the true cost of relocation* (ii) the probable revenues to be derived by the Carrier from operations over the relocated line**, (iii) the probable expenses to be incurred by the Carrier from operations over the relocated line (iv) the revenues and expenses of the system as an entirety** and (v) the over-all effect of the relocation upon the transportation public.**

The Commission has disposed of the entire question by holding that the relocation should not be required because the Carrier would not earn a return on the cost of reloca-

* The Commission found that it was "not convinced of the accuracy of any of the estimates" of the cost of relocation (R. p. 25).

** There was *no evidence* with respect thereto.

tion, regardless of who pays for the same. Such a determination, it is submitted, is unlawful.

The Appellants submit, therefore, that the order of the Statutory Court dismissing their bill of complaint should be reversed and that a permanent injunction should be granted restraining and enjoining the abandonment of the railroad service by the Carrier under the certificate issued.

Respectfully submitted,

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No. 803

In the Supreme Court of the United States

OCTOBER TERM, 1941

STEUART PURCELL, EDMUND H. BUDNITZ, AND ARTHUR H. BRICE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, ET AL., APPELLANTS

v.

THE UNITED STATES OF AMERICA, THE CONFLUENCE AND OAKLAND RAILROAD COMPANY ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

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OPINION BELOW

The opinion of the District Court (R. 43) is reported in 41 F. Supp. 309. The reports of the Interstate Commerce Commission (R. 20, 31) are published in 244 I. C. C. 451 and 247 I. C. C. 399.

JURISDICTION

The final order of the District Court was entered October 13, 1941 (R. 53). The petition for appeal was filed on November 5, 1941 (R. 53–54), and was allowed on November 5, 1941 (R. 54–55). Juris-

diction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219–221 (U. S. C., title 28, secs. 47, 47a), and under section 238 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936 (U. S. C., title 28, sec. 345). Probable jurisdiction was noted on January 5, 1942 (R. 60).

QUESTION PRESENTED

The United States in carrying out a flood-control project was about to acquire, by purchase or condemnation, land on which was located a branch line of railroad. Completion of the project would flood a part of the line so as to make abandonment of the whole inevitable. The branch had in the past produced profits for the system of which it was part, but relocation in order to preserve existing service could be effected only at a cost greatly disproportionate to revenue of the branch and to public need for the service. The Interstate Commerce Commission authorized abandonment of the line without requiring relocation. The question is whether the Commission erred in disregarding the prospect that the Government would pay the cost of relocation with the consequence that the railroad would not have to bear an unreasonable financial burden in continuing transportation on the branch.

STATUTES INVOLVED

The relevant provisions of the Interstate Commerce Act and of the Act of June 28, 1938, 52 Stat.

1215–1216, are set forth in the Appendix, *infra*, pp. 32–35.

STATEMENT

On January 15, 1940, the Confluence and Oakland Railroad Company and the Baltimore and Ohio Railroad Company applied jointly to the Interstate Commerce Commission for an authorization to the former to abandon, and to the latter to abandon operation of, a branch line of railroad extending from Confluence and Oakland Junction, Pennsylvania, south to Kendall, Maryland. The application was opposed by the Public Service Commission of Maryland, and protests were filed by local interests (R. 21). The facts are not in dispute and the circumstances surrounding the application may be summarized from the Commission's findings.[1]

The Confluence and Oakland Railroad Company owned the line of railroad which was the subject of this application. In 1890 the Baltimore and Ohio Railroad Company, which held all of the outstanding stock of the Confluence and Oakland, leased the property for a term of 999 years. (R. 21.)

The line, approximately 19.79 miles in length, runs through a semimountainous section of southwestern Pennsylvania and western Maryland, following generally the course of the Youghiogheny River; it connects with the main line of the Balti-

[1] The report of the full Commission on reargument (R. 32) adopted the findings made by Division 4 (R. 21–26).

more and Ohio at Confluence and Oakland Junction, Pennsylvania (R. 21). There are eleven stations along the line, the largest of which are Somerfield, Pennsylvania, and Friendsville, Maryland, with populations of 250 and 600, respectively. The total population embraced within an area of one-half mile on both sides of the road throughout its length is estimated to be 2,000.

In the territory served by the railroad, farming is carried on to a limited extent, while lumbering, which flourished at one time, has largely disappeared because of the depletion of standing timber. All coal mines formerly operating along the line have been abandoned except one which is operated by McCullough Coal Corporation, a protestant before the Commission and one of the appellants here. This mine is located between Friendsville and Kendall, and is the only industry of importance in the area. (R. 22.)

United States Highway 40 and a paved state highway cross the railroad at Somerfield and at Friendsville, respectively. Improved state highways parallel the line at a substantial distance on each side. Secondary roads traverse the area, affording connections with these highways. No common-carrier bus or truck service operates in the immediate territory except at Friendsville, which is served by a truck line operating out of Cumberland, Maryland. Deliveries are made to all points, however, by local and private trucks op-

erating mainly from Confluence and Somerfield. (R. 22.)

In recent years train service over the line has consisted of a mixed train in each direction on Tuesdays and Saturdays, operating from Rockwood, Maryland, a point on the main line about ten miles east of Confluence and Oakland Junction, Pennsylvania (R. 22). The Commission made detailed findings as to the volume of traffic, operating cost, and revenues attributable to the operation of the line for the years 1934 to 1939, inclusive (R. 22–24). During that period the average annual traffic on the line was 390 passengers, 670 carloads of freight, and 360 tons of freight in less-than-carload lots.[2] The average annual gross revenue was $51,571 (R. 32). Considered independently, the branch railroad operated at a loss; but system profits from line traffic more than offset this loss, leaving an average annual net profit to the carriers of from $1,125 to $23,781, depending upon the operating ratio applied in estimating system cost of handling traffic which originated at or was destined to points on the line.[3]

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[2] These averages are computed by combining in-bound and out-bound traffic as shown in the report of Division 4 (R. 22–23). All freight was interline freight; no local freight was carried (R. 22).

[3] It was found that the annual system profits from operation of the line during this six-year period averaged (1) $1,125 if, as proposed by the carriers, use was made of ratios of system cost (of handling traffic originating at or destined to points on this line) to revenues therefrom ranging from

Division 4, in its report of March 6, 1941, found that within one year further operation over the present line must cease because of construction by the federal Government of a dam across the Youghiogheny River at a point on the line about one mile above Confluence and Oakland Junction, Pennsylvania (R. 27–28). The reservoir to be created by the dam will inundate approximately twelve miles of the line, from the dam site to a point upstream near Friendsville, Maryland. Beyond the high-water mark, the six miles of line farthest from the junction will be isolated and rendered inoperable, leaving usable only the one-mile segment below the dam (R. 24–25).

The United States, acting through the War Department, elected to exercise an option which it had obtained to purchase the portion of the line to be flooded for an agreed price of $306,000 and salvage rights (estimated at $25,965),[4] subject to the Interstate Commerce Commission's approval of the application by the railroad to abandon. If

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73.14 percent to 77.93 percent (described as the operating ratio), (2) about $23,781 if a 25-percent operating ratio, advanced by appellants, was used, (3) $12,395 if a 50-percent operating ratio, frequently used in cases presenting the present type of allocation problem, was used (R. 23–24, 26).

[4] As of December 31, 1936, the original cost to that date of the property, exclusive of land and assessments for improvements, was $398,873; and as of the same date the cost of reproduction, less depreciation, and the value of land and rights in land were reported by the Commission's Bureau of Valuation to have been $350,674 and $8,717, respectively (R. 21–22).

it should prove impossible to consummate the agreement, the property would be taken by condemnation. (R. 25.)

The coal mine of McCullough Corporation is situated above the projected reservoir and will not be flooded. However, inundation of the Confluence and Oakland Railroad will cut off all rail service to the mine and would require the company to transport its coal by motor trucks between the mine and the nearest railhead, at a cost of $1.12 per ton; under such circumstances McCullough would be forced to cease operations because of inability to compete with other mines more favorably located. (R. 26.) Since the mine will not be flooded by the reservoir, the United States will not compensate the coal company by acquiring its property, either through purchase or condemnation (R. 35).

In the past practically the entire production of the McCullough mine has been shipped by rail to nearby eastern points. Its shipments of coal have been the major source of revenue to the Confluence and Oakland line, averaging 27,211 tons annually during the period 1921 to 1933 and 22,386 tons during the period 1934 to 1939. (R. 26.) In opposing the application for abandonment, McCullough presented testimony that a relocated line of railroad sufficient to carry the present

[1] Varying estimates of the value of the company's property were given by witnesses in the District Court; the largest of these estimates was $308,262.13 (R. 46).

traffic could be constructed for approximately $800,000. Applicant carriers and the War Department presented four estimates ranging from $2,018,000 to $2,519,000. The applicants also showed that normal maintenance expenses on the new road would be annually about $8,000 greater than similar charges have been on the present line, and that an additional expenditure of $8,000 per year for five years would be required while the roadbed underwent seasoning. (R. 25.) Protestants' estimated maintenance expenses for the line were even higher (R. 26).

After hearing before a trial examiner of the Interstate Commerce Commission, a proposed report was submitted by the examiner recommending that the application for abandonment be denied (R. 11–20). Division 4 of the Commission, however, ruled that the public convenience and necessity would permit abandonment and that relocation was not required, since the cost of relocating the line, whether borne by the carriers or by the Government as condemnor, was disproportionately large in relation to the value of the transportation performed to warrant ordering a continuation of that service (R. 20–29). On reargument before the full Commission, the decision of Division 4 was affirmed, the Chairman and two Commissioners dissenting (R. 31–38).

Subsequently, the Public Service Commission of Maryland and McCullough Coal Corporation filed a complaint against the United States and the two

railroad companies in the District Court of the United States for the District of Maryland (R. 1). The bill prayed that the order of the Commission granting the carriers' application be set aside and annulled (R. 10). The Interstate Commerce Commission intervened as a party defendant (R. 39). A three-judge statutory court was convened to hear the case on October 1, 1941 (R. 43). The District Court filed its opinion October 13, 1941 (R. 43–52), and on the same day decreed dismissal of the complaint (R. 53).

SUMMARY OF ARGUMENT

I

Where there is no physically possible alternative to abandonment of a present line of railroad, the Interstate Commerce Commission is authorized to order relocation if preservation of the existing service is required by the public convenience and necessity. In such a case the Commission properly considers the cost of relocation in determining on an application for abandonment whether to grant unconditional authority to abandon under section 1 (18) of the Interstate Commerce Act. The granting of such a certificate is proper when the cost of relocation is too heavy and operation of the relocated line will prove too severe a drain on the carrier to be warranted by the public advantages of continuation of the service; this is a ques-

tion for the judgment of the Commission upon a consideration of all the factors.

II

The cost of relocating the Confluence and Oakland Railroad has been estimated between $800,000 and $2,500,000. If the lowest figure be taken, and if it be assumed that conditions of traffic on the railroad remain approximately constant, it is clear that the net profits to be derived, even if estimated according to the operating ratio contended for by McCullough, would give less than a 3% return on the capital invested. If, as is more probable, the cost should come to $1,500,000 and the income amount to only about $12,000, the rate of return would be .8%. In either case the return would be clearly insufficient to pay carrying charges on the capital hypothetically invested, if financing were possible at all. In view of the admitted increase in operating expenses over a relocated line, it is entirely probable that the road would have no profit, but would instead operate at a loss. Against these considerations the balance of advantages to be gained from operation of a relocated line of the branch railroad is plainly uneven, and the Interstate Commerce Commission correctly granted a certificate unconditionally authorizing abandonment.

III

The fact that the cost of relocation may be borne by the Government, as a part of the expense of acquiring the land on which the present Confluence and Oakland line is situated, does not alter the propriety of granting unconditional authority to abandon. The United States is not required to pay the cost of relocation of the railroad unless the line is in fact relocated, and relocation will not be effected unless required by public authorities. Accordingly, it should not be assumed in the abandonment proceeding that the Government will bear the cost of relocation; rather, the Commission should consider the application for abandonment without regard to the source of capital for relocating the line. Only if it should decide independently that the public convenience and necessity required relocation ought the Government appropriation for defraying the cost to become significant and applicable. Financial strain upon the applying carriers is not the sole standard by which to measure considerations favoring abandonment. Economically wasteful railroad operations do not serve the public convenience and necessity, and the Interstate Commerce Commission is not required to order their continuance or initial undertaking. Instead the Commission properly authorizes abandonment of such transportation service.

ARGUMENT

I

WHERE RELOCATION OF A LINE OF RAILROAD THAT MUST BE ABANDONED IS TOO COSTLY TO BE ECONOMICALLY JUSTIFIABLE THE INTERSTATE COMMERCE COMMISSION MAY AUTHORIZE ABANDONMENT WITHOUT RELOCATION

Section 1 (18) of the Interstate Commerce Act prohibits carriers by railroad from abandoning a line without having first obtained a certificate of public convenience and necessity from the Interstate Commerce Commission. Section 1 (20) authorizes the issuance of certificates by the Commission, with such conditions attached as the public convenience and necessity require. In some cases the Commission has employed this power of attaching conditions for the purpose of ordering a relocation of the line abandoned. *St. Louis-San Francisco R. R.*, 244 I. C. C. 485; *Union Pacific R. R.*, 228 I. C. C. 540; *Baltimore & Ohio R. R.*, 217 I. C. C. 456; *Baltimore & Ohio R. R.*, 207 I. C. C. 284. In other cases the Commission has authorized abandonment without requiring relocation. *Southern Ry.*, 217 I. C. C. 764; *Los Angeles & S. L. R. R.*, 212 I. C. C. 597; *Boston & Albany R. R.*, 202 I. C. C. 555.

In the present type of situation, where continued operation of the old line will shortly become a physical impossibility, this power to condition might prove ineffective. If the carrier should

elect to discontinue operations on the line after the land has been taken by eminent domain without applying to the Commission for authority to abandon, it is possible that proceedings could be instituted against the railroad under section 1 (20) of the Interstate Commerce Act on the theory that no abandonment of a transportation *service* as distinguished from a *line* of railroad was lawful in the absence of a certificate; that condemnation would be a defense only to abandonment of a particular line. However, if the sanctions contained in section 1 (20) should be held not available, independent authority in the Commission to order relocation is probably contained in section 1 (21) of the Act; the statute there empowers the Commission, upon complaint or upon its own initiative, to authorize or require a railroad to extend its line or lines, provided that the extension is reasonably required in the interest of public convenience and necessity and that the expense to the carrier will not impair its ability to serve the public. While that section does not authorize the Commission to order a major extension through territory not previously served, its scope is not confined to spur, switching, industrial, and side tracks, but probably comprehends relocation of lines rendering existing service. *I. C. C.* v. *Oregon-Washington R. R. & Nav. Co.*, 288 U. S. 14, 38–39, 40.[8]

[8] Appellants have not raised in this case the question of the Commission's power to order relocation. Indeed their case depends upon its existence; if the Commission could not re-

Where, however, the railroad in a situation like that of the present case chooses to apply to the Commission for authority to abandon a particular line, the Commission is, in effect, called upon then to decide whether the alternative to abandonment of the service—relocation—is required by the public convenience and necessity.

The dissenting Commissioners expressed the view that this problem was not then before the Interstate Commerce Commission (R. 38). They reasoned that in the absence of the Government's flood control program with the projected use of the Youghiegheny River basin as a reservoir there would be no presently existing ground for granting the railroads' application to abandon the Confluence and Oakland branch. This much may be conceded for the purposes of the present litigation. They then urge that the Commission should grant no certificate of abandonment, and should not consider the question of relocation until the United States has taken the railroad land by eminent domain. Such a procedure absolutely requires the Government to resort to a condemnation suit and incur its attendant expenses, when acquisition of

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quire relocation of the Confluence and Oakland, the carriers would eventually abandon the present line without having secured a formal authorization, and appellants would be wholly without remedy. The only practical difference between such a procedure and that of first obtaining a certificate is that nonauthorized abandonment would have to be preceded by condemnation and not a mere sale to the United States.

the property in that manner may prove to have been needless, if relocation of the line condemned is not later decreed by the Commission.

In addition to the undesirability of multiplying litigation and of increasing the cost to the United States of acquiring land for public use, other considerations persuade against accepting the minority view that the Commission should close its eyes to future impossibility of operation on the branch line until the impossibility has become effective. In the eminent domain proceeding contemplated by the dissenting Commissioners it would not be possible to fix the total award until the question of relocation had been finally determined; if no allowance were made for the expense of relocating a railroad and the Commission later ordered relocaton, the carrier would be seriously burdened and might then be unable to secure full compensation. If on the other hand the condemnation award included an amount for relocation damages and the Commission subsequently authorized abandonment of the branch line service without relocation, the railroad would be unjustly enriched. Cf. *United States Feldspar Corp.* v. *United States*, 38 F. (2d) 91 (N. D. N. Y.).[1]

[1] There a state authority condemned the portion of a branch road nearest to its main line connection, leaving the end portion isolated. In order to avoid the delay of an appeal, the authority paid an award sufficient to absorb the cost of relocation. Subsequently the Interstate Commerce Commission authorized abandonment of the branch without requiring relocation. A bill in equity to enjoin enforcement

While this difficulty could be alleviated procedurally through postponing the final award, since the United States may acquire title to land at the time when a declaration of taking is filed and before compensation is awarded,[8] it would be generally impossible as a practical matter under the minority Commissioners' view for the railroad ever to effect relocation before service on the old line had been interrupted; instead, a substantial interval with no service is probable, which would be certainly very injurious to shippers in McCullough's position. And under this view the making and execution of agreements by the Government or a governmental agency with the carrier to construct a relocated line which should be ready by the time when the old branch is abandoned would be rendered impractical. Cf., *e. g., Union Pacific R. R.*, 228 I. C. C. 540; *Baltimore & Ohio R. R.*, 207 I. C. C. 281. In the past, the Commission through its Division 4 has consistently considered and acted affirmatively on applications for abandonment where an operation of line would soon have to cease because of the Government's clear purpose to condemn.[9] Accordingly, we think that the majority of the Commission was clearly right in entertaining the railroad's ap-

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of the order granting the certificate was brought by a company situated analogously as McCullough Coal Corporation here; it was dismissed by the District Court.

[8] Act of February 26, 1931, c. 307, 46 Stat. 1421.

[9] See cases cited at p. 12 *supra*.

plication and authorizing an abandonment which was inevitable. There remains the principal question, whether relocation should have been contemporaneously ordered.

The statutory standard set to guide the Commission in passing on an application for unconditional abandonment is formed by the requirements of the public convenience and necessity. Determination requires a balancing of interests by the Commission in each case. Mr. Justice Brandeis, speaking for the Court, said in *Colorado* v. *United States*, 271 U. S. 153:

> While the constitutional basis of authority to issue the certificate of abandonment is the power of Congress to regulate interstate commerce, the Act does not make issuance of the certificate conditional upon a finding that continued operation will result in discrimination against interstate commerce, or that it will result in a denial of just compensation for use in intrastate commerce of the property of the carrier within the State, or that it will result in a denial of such compensation for the property within the State used in commerce intrastate and interstate. The sole test prescribed is that abandonment be consistent with public necessity and convenience. In determining whether it is, the Commission must have regard to the needs of both intrastate and interstate commerce. For it was a purpose of Transportation Act, 1920, to establish and maintain adequate service for both. * * * The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other

> will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must be weighed against the burden thereby imposed upon other commerce. * * * The result of this weighing—the judgment of the Commission—is expressed by its order granting or denying the certificate. [271 U. S. 167–168.]

From this statement it is plain that no one element of disadvantage in continuance of service is essential to authorize abandonment; a particular disadvantage may, however, be determinative, depending upon the opposing considerations. Clearly the burden of continuing future deficits from operation or of heavy expenditure required to preserve existing service would be sufficient for abandonment if the benefits of and public need for continued operation were not great; the Commission would not be required to find before authorizing abandonment that continuance would result in a discrimination against interstate commerce or would prevent the railroad from earning a fair return on its whole property.

The necessity for a large capital outlay by a carrier to continue operating a branch line has been held a sufficient ground for authorizing abandonment. *Transit Commission* v. *United States*, 284 U. S. 360. There the Long Island Railroad had been ordered by a state commission to eliminate the grade crossings on a branch of its railroad less than five miles long. These improvements would

cost approximately $4,000,000; of this sum the company would be obliged to pay half, which it might borrow from the state at four to five percent interest. The company then applied to the Interstate Commerce Commission to abandon most of the branch. Authority was granted in view of the prospective compulsory expenditure, the Commission finding that the public interest in continued service was insufficient to warrant a denial of the certificate to abandon.

The Long Island Railroad prior to its application to the Commission had probably incurred deficits in operating the branch in question (284 U. S. 369); but the important consideration moving the Commission's action was plainly the future expenditure to comply with the order of the New York regulatory authority.[10] This Court, in sustaining the Commission's decision, stated:

> * * * It was found that the expenditure for removal of grade crossings would, in the circumstances, be a waste of the company's funds, and that the requirement of the State Transit Commission removed all doubt of the propriety of abandonment of the branch. The magnitude of the required outlay as compared with the value of the whole property, and the resulting effect on the com-

[10] In cases similar to the present the Commission has not regarded past profitable operations as precluding a present authorization to abandon. *Cisco & Northeastern Ry.* (F. D. No. 13449, January 28, 1942); *Southern Ry.*, 217 I. C. C. 764; *Boston & Albany R. R.*, 202 I. C. C. 555.

> pany's revenue, were facts properly taken into account in passing on the application. * * *.
>
> In reaching these conclusions the Commission considered the needs of the communities served, and gave due regard to them * * *. [284 U. S. 368.]

In balancing the considerations favoring and opposing abandonment, the Commission makes an expert appraisal of the transportation situation with respect to the requirements of public convenience and necessity; its judgment should not be set aside unless it is arbitrary and unreasonable or has been reached on an erroneous theory of law.

II

EXPENSES ENTAILED BY RELOCATION OF THE CONFLUENCE AND OAKLAND RAILROAD WOULD BE SO GREAT AS TO WARRANT UNCONDITIONAL ABANDONMENT OF THE LINE

We think there would be no contest of the validity of the Commission's order authorizing abandonment without relocation in this case but for the contingency that the railroads may not be required to supply the cost of relocating the branch line to Kendall, Maryland. If the burdens of relocation were to fall wholly on the carriers, the facts are such as plainly to justify unconditional abandonment. Cf. *Transit Commission* v. *United States*, 284 U. S. 360.

The cost of the railroad, up to the end of 1936 had been approximately $400,000; at the same

time, the cost of reproduction, less depreciation, would have been $350,000. Its real property alone was worth less than $9,000; the United States arranged to buy the property for $306,000 plus salvage, which would be approximately $26,000. Relocation of the line would require an outlay estimated at $800,000 to $2,500,000. The Commission stated that it was not convinced of the accuracy of any of the estimates of construction cost submitted (R. 25); probably the actual cost of relocation would lie somewhere between the figures advanced by appellants on the one hand and by applicant railroads and the War Department on the other.

While the Confluence and Oakland branch considered alone operated at a loss during the years 1934 to 1939, movement of interline traffic over the branch [11] resulted in profits to the Baltimore and Ohio system. If, as contended by the carriers, the system cost of handling such traffic should be figured at about 75 percent of the system gross revenues from the traffic, net profits for the six years in question were $533, $95, $5,612, $3,016 (loss), $3,523 (loss), and $7,048 (R. 24); this produced average annual profits of $1,125 (R. 32). If an operating ratio of 50 percent were employed, the corresponding system net profits were $8,875, $8,634, $18,351, $9,018, $6,412, and $23,079 (R. 24); the annual average here was $12,395 (R. 32). If

[11] There was only negligible local traffic on the branch (R. 13, 22).

appellants' operating ratio of 25 percent were accepted the figures would have been $17,830, $17,406, $32,115, $20,567, $15,304, and $39,463 (R. 24); the average on this basis was $23,781 (R. 32).

The Commission did not adopt a particular construction cost or operating ratio; it assumed the figures most favorable to appellants and found that continued operation would not yield a reasonable return on the investment of capital in the line (R. 28); annual profits of $23,781 would amount to less than 3% on $800,000. This small income would very possibly be obliterated by increased maintenance costs on the relocated line; the railroads showed that maintenance expenditures would be permanently increased by $8,000 annually and for five years by an additional expense of $8,000 while the road underwent seasoning (R. 25); the protestants estimated the increase in maintenance expenditures even higher (R. 26).

More probably, the cost of relocation would be about $1,500,000, still considerably short of the estimates advanced by the applicant carriers; and adoption of a 50 percent operating ratio, frequently used in the present type of situation, would give a more accurate figure for the annual profit produced by the branch line. On the basis of those assumptions, the annual yield would scarcely exceed .8%; in absolute terms the calculated net profit would probably not exist at all, as a result of increased operating cost; rather the branch would operate

at a loss, even considered as part of the Baltimore and Ohio system.

The railroads could not secure capital to finance the relocation at any but a much higher rate than the most sanguine estimates of return. The resulting burden on the Baltimore and Ohio system in any case is evident.

During the five years before 1941 rail service on the Confluence and Oakland branch consisted of one mixed train in each direction semiweekly (R. 22). Passenger traffic has been very small, averaging less than 400 annually for the period 1934 to 1939 (R. 22). Freight traffic during the same period (R. 22–23) is summarized in the table appearing below.[12] The principal source of freight traffic was the coal shipments from appellant coal company's mine. The outbound shipments of coal for each year during the period 1934 to 1939 were, in order, 23, 230, 531, 451, 311, and 725 carloads (R. 23). It is apparent that in spite of consider-

[12]

Interline Freight *

Year	No. of Carload Shipments		Tons of Freight in less than Carload Shipments	
	Inbound	Outbound	Inbound	Outbound
1934	502	91	227	170
1935	196	285	326	21
1936	222	613	383	11
1937	201	525	381	27
1938	196	327	321	16
1939	194	735	249	32

* No local freight was handled (R. 22).

able fluctuation in volume [13] the outbound shipments of coal have become the only sustaining source of revenue to the line. While 343 carloads of contractors' equipment supplies, and road building material were handled over the line in 1934, since that time the volume has fluctuated from 49 carloads in 1935 to 94 in 1938 and 36 in 1939 (R. 22–23). Shipments of agricultural products have averaged only 53 carloads annually (R. 23). Incoming gasoline and oil shipments have declined steadily from 98 carloads in 1934 to 30 in 1939, and during the same period shipments of forest products declined from 55 to 9 (R. 23). Although the merchants of the largest town, Friendsville, use the line to the extent of approximately 40 carloads of freight annually, much of their merchandise is delivered by motor trucks and the railroad is only used for shipping heavy commodities such as feed and cement (R. 28).

The only towns of any size served by the branch line are Somerfield, Pennsylvania, eight miles from Confluence and Oakland Junction and having a

[13] Shipments averaged annually 27,211 tons from 1921 to 1933; 9,086 tons from 1933 to 1935; and 27,728 tons for 1936 and 1937. In 1938 the volume handled was 17,632 tons and in 1939 it was 40,243 tons (R. 26). Evidence before the Commission concerning the cause of the large increase in 1939 was conflicting (R. 16); Division 4 in its report merely stated that the applicants claimed that the increase resulted from a suspension of operations in the unionized bituminous coal fields during April and May of the year in question (R. 26).

population of 250, and Friendsville, Maryland, seventeen miles from the junction and having a population of 600. The total population within an area of one-half mile on either side of the line is estimated at 2,000. Some farming is carried on in the area, while lumbering has practically ceased owing to depletion of available timber. All mines along the line have been abandoned except that of McCullough Coal Corporation. Friendsville is served by a truck line operating out of Cumberland, Maryland. Although no other common carrier truck or bus service operates in the immediate territory, deliveries are made to all points by local and private trucks operating mainly out of Confluence and Somerfield. Improved state highways parallel the line at a substantial distance on each side, U. S. Highway 40 crosses it at Somerfield, and a paved state highway crosses it at Friendsville. Secondary roads traverse the area, affording connections with the highways. (R. 22.)

From these circumstances it is plain that aside from the requirements of the coal company there is virtually no public need for continuation of the Confluence and Oakland transportation service between the junction in Pennsylvania and Kendall, Maryland. Such use as there has been by local business of the branch railroad could be replaced by motor carriage without serious difficulty or inconvenience. We think also that the need of Mc-

Cullough Corporation for continued rail service is quite insufficient to overbalance the considerations opposing relocation. The Commission found that abondonment of the company's present railroad service would force closing of the coal mine, since transportation by motor truck to the nearest railhead would cost $1.12 per ton, making it impossible for McCullough to compete with more favorably located mines (R. 26). Thus, abandonment of the Confluence and Oakland will render McCullough's coal property largely worthless. The highest estimate placed on its value by any of the witnesses in the District Court was $308,262.13 (R. 46). Relocation would cost several times that sum.

Far from there being only substantial evidence to support the Commission's finding that public convenience and necessity will permit of unconditional abandonment, the administrative determination made was clearly correct. *United States Feldspar Corp.* v. *United States*, 38 F. (2d) 91 (N. D. N. Y.); cf. *Transit Commission* v. *United States*, 284 U. S. 360.

III

THE COMMISSION PROPERLY AUTHORIZED UNCONDITIONAL ABANDONMENT REGARDLESS OF WHETHER THE CARRIERS WOULD BE OBLIGED TO BEAR THE COST OF RELOCATION

Appellants urge that a different result must follow because appellee railroads may not have to pay the expense of relocation. The issue is one of

statutory construction of the words "public convenience and necessity"; if the Commission's interpretation, excluding consideration of the source of necessary capital for relocation, is in error, its order must be set aside and the proceeding before the Commission reopened for a new determination in accordance with the opposing principle. The Government urges, however, that the view of the statute taken by the Interstate Commerce Commission and by the District Court is right.

It is probable that where the land on which a public utility is located is taken by eminent domain the owner is constitutionally entitled to compensation from the condemnor for the cost of relocating its utility when relocation is essential. *Wayne County, Ky.*, v. *United States*, 53 C. Cls. 417, affirmed *per curiam*, 252 U. S. 574; *United States* v. *Wheeler Township*, 66 F. (2d) 977 (C. C. A. 8); *United States* v. *Town of Nahant*, 153 Fed. 520 (C. C. A. 1); cf. *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U. S. 613. Section 2 of the Act of June 28, 1938, c. 795, 52 Stat. 1215–1216, makes provision for paying the cost of utility relocation where the Secretary of War acquires land in the name of the United States for projects covered by the statute. However, there is obviously no constitutional requirement that the United States pay relocation damages to a condemnee if the latter need not relocate; and presumably public funds would not in such a case be

available under the statute to reimburse a railroad for hypothetical and nonessential relocation. Here, as evidenced by the option obtained by the War Department, it is clear that the carriers will not relocate the Confluence and Oakland line unless required by the Interstate Commerce Commission. Reimbursement from the United States for relocation is therefore dependent upon the Commission's decision. If, in the abandonment proceedings, that reimbursement is assumed as certain, escape is effected from the logical circle only arbitrarily and a decision against abandonment rests wholly on the thing assumed. Accordingly, we submit that a determination on unconditional abandonment should be made without regard to the prospect of government indemnity for the cost of relocation; this the Commission did.

The majority ruled that wasteful expenditures to enable continuance of service by a branch railroad would not serve the public convenience and necessity, even if the waste entailed would fall upon the general public instead of the carriers. One of the chief objects of the Transportation Act of 1920 was "to secure the avoidance of waste." See *Texas* v. *United States*, 292 U. S. 522, 530; *Georgia* v. *United States*, 28 F. Supp. 749, 750. In *The New England Divisions Case*, 261 U. S. 184, 189, 190, the Court referred to the Commission's new power under that Act to authorize abandonment of unprofitable and unnecessary lines as a means of insuring adequate transportation serv-

ice."[14] The Transportation Act of 1940 was enacted in general amendment of the statutes administered by the Interstate Commerce Commission, consolidating them in a revised Interstate Commerce Act. The revision was opened with the following statement of policy:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; * * *. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy (c. 722, 54 Stat. 899).

It is true that an important purpose of the Interstate Commerce Act as amended was the protection of the financial stability of railroads in order that they might serve the public need efficiently; but we submit that while this may be a minimum re-

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[14] In *Chesapeake & Ohio Ry.* v. *United States*, 283 U. S. 35, the Court said concerning paragraphs 18 to 22 of section 1:

"Undoubtedly the purpose of these provisions is to enable the Commission, in the interest of the public, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service." [283 U. S. 42.]

quirement it is not the maximum set by the statutory standard of public convenience and necessity. *Colorado* v. *United States*, 271 U. S. 153, 169. In the previously decided case most closely resembling the present suit a statutory court of three judges found no difficulty in sustaining the Commission's order approving abandonment even though the burden of relocation would not fall on the railroad;[15] in fact, the cost of relocating had there already been paid unconditionally to the carrier by the state condemnor. *United States Feldspar Corp.* v. *United States*, 38 F. (2d) 91 (N. D. N. Y.).

Expenditure of the sum required to relocate the branch railroad involved in the present case is not justified by public demand for the service. Preservation of transportation facilities under such circumstances is not less wasteful with respect to economical operation of the national transportation system as a whole because public funds, rather than those of a carrier, are expended for the purpose.

CONCLUSION

The Interstate Commerce Commission properly authorized unconditional abandonment by the applicant railroads of the Confluence and Oakland

[15] In *Transit Commission* v. *United States*, 284 U. S. 360, the New York authority requiring elimination of grade crossings was to pay one-half of the cost.

branch line. It is therefore respectfully submitted that the decree of the District Court dismissing the complaint was correct and should be affirmed.

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FEBRUARY 1942.

APPENDIX

Section 1 (18) of the Interstate Commerce Act, as amended (U. S. C. title 49, sec. 1 (18)), provides:

> No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment. Nothing in this paragraph or in section 5 of this title shall be considered to prohibit the making of contracts between carriers by railroad subject to this chapter, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.

Section 1 (20) (U. S. C. title 49, sec. 1 (20)), provides:

> The commission shall have power to issue such certificate as prayed for, or to refuse to

issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

Section 1 (21) (U. S. C. title 49, sec. 1 (21)), provides:

The commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this chapter, party to such pro-

ceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this chapter, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this chapter which refuses or neglects to comply with any order of the commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Section 2 of the Act of June 28, 1938, c. 795, 52 Stat. 1215–1216, provides, in part:

That in case of any dam and reservoir project, or channel improvement or channel rectification project for flood control, herein authorized or heretofore authorized by the Act of June 22, 1936 (Public, Numbered 738, Seventy-fourth Congress), as amended, and by the Act of May 15, 1928 (Public, Numbered 391, Seventieth Congress) as amended by the Act of June 15, 1936 (Public, Numbered 678, Seventy-fourth Congress), as amended, title to all lands, easements, and rights-of-way for such project shall be acquired by the United States or by States, political subdivisions thereof or other responsible local agencies and conveyed to the United States, and provisions (a), (b), and (c) of section 3 of said Act of June 22, 1936,

shall not apply thereto. Notwithstanding any restrictions, limitations, or requirement of prior consent provided by any other Act, the Secretary of War is hereby authorized and directed to acquire in the name of the United States title to all lands, easements, and rights-of-way necessary for any dam and reservoir project or channel improvement or channel rectification project for flood control, with funds heretofore or hereafter appropriated or made available for such projects, and States, political subdivisions thereof, or other responsible local agencies, shall be granted and reimbursed, from such funds, sums equivalent to actual expenditures deemed reasonable by the Secretary of War and the Chief of Engineers and made by them in acquiring lands, easements, and rights-of-way for any dam and reservoir project, or any channel improvement or channel rectification project for flood control heretofore or herein authorized: *Provided,* that no reimbursement shall be made for any indirect or speculative damages: *Provided further,* That lands, easements and rights-of-way shall include lands on which dams, reservoirs, channel improvements, and channel rectifications are located; lands or flowage rights in reservoirs and highway, railway, and utility relocation.

Supreme Court of the United States

OCTOBER TERM, 1941

No. 803

STEUART PURCELL, EDMUND H. BUDNITZ AND ARTHUR H. BRICE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, *et al., Appellants,*

vs.

THE UNITED STATES OF AMERICA, THE CONFLUENCE AND OAKLAND RAILROAD COMPANY *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Memorandum in Behalf of Appellees, The Baltimore and Ohio Railroad Company and The Confluence and Oakland Railroad Company.

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Supreme Court of the United States

OCTOBER TERM, 1941

No. 803

STUART PURCELL, EDMUND H. BUDNITZ AND ARTHUR H. BRICE, CONSTITUTING THE PUBLIC SERVICE COMMISSION OF MARYLAND, *et al., Appellants,*

vs.

THE UNITED STATES OF AMERICA, THE CONFLUENCE AND OAKLAND RAILROAD COMPANY *et al.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Memorandum in Behalf of Appellees, The Baltimore and Ohio Railroad Company and The Confluence and Oakland Railroad Company.

Counsel for The Baltimore and Ohio Railroad Company and The Confluence and Oakland Railroad Company, appellees herein, have been furnished with a copy of the brief which is being filed herein in behalf of the United States. To avoid duplication, we are not filing any brief in behalf of the Railroad Companies but desire to advise the Court in behalf of the Railroad Companies that we are fully in agreement with the position taken before the Court in the Government's brief, and wish to adopt as our own the argument therein contained.

So far as the railroads are concerned, their primary interest in this case has been, and is, that the measure of damages to be applied to recompense them for the taking of their property should be definitely established. The option given by them to the War Department to purchase for $306,000 the part of the line affected by the abandonment proceedings was subject to

the approval by the Interstate Commerce Commission of the railroads' application for abandonment (R. 25). Whether that amount will need to be increased will depend upon the outcome of this case.

As appears from the Government's brief, the only question of practical significance in this case is whether the Commission should have authorized an abandonment without requiring a relocation of line. Before the railroads applied to the Commission for authority to abandon the existing line, the War Department had already determined that if the property could not be taken by purchase, it would be taken by condemnation (R. 25). When the matter came before it, the Commission did consider the question of whether it should require a relocation (R. 25-26, 28). As appears from the Commission's own report, the appellees' evidence showed that the cost of relocation would be from $2,018,000 to $2,519,000 (R. 25-26). Though the appellants offered evidence that the cost of such relocation would be $800,000, their estimate of the cost of maintaining the relocated line was even higher than that of the appellees (R. 25-26). The Commission found that past system profits computed upon the basis claimed by the appellants were not sufficient to yield a reasonable return even on the sum of $800,000, which the appellants claimed would be the cost of relocation, and that the return would be further reduced by increased operating costs (R. 28).

Though we do not believe this finding essential to the sustaining of the Commission's order, since under the statute there is no requirement that abandonment be conditioned upon a relocation and, in cases of this sort, the Commission only requires a relocation where, in view of all the factors involved, it would not otherwise grant the application for abandonment, it is pertinent in this connection that in only one of the five years, 1935-1939, inclusive, did The Baltimore and Ohio Railroad Company not have a deficit in net income, see Exhibit A, page four, Return to Questionnaire, original not printed but made a part of the record herein (R. 58). In this connection, this Court will also be interested in the facts recited in *In re Baltimore and Ohio Railroad Company*, 29 F. Supp. 608 (1939), (Cer. den., 309 U. S. 654, and application for rehearing denied, 309 U. S. 697) which,

we submit, are likewise a factor to be considered in determining the reasonableness of the Commission's approving the abandonment involved in this case without requiring a relocation. As appears from the opinion in the above case, The Baltimore and Ohio Railroad Company, due to an inability to meet its maturities and fixed charges, was forced in 1939 to seek relief therefrom in a proceeding under Chapter XV of the Federal Bankruptcy Act as amended. But, as appears from the opinion, that relief was merely "temporary" and under the readjustment plan which was effectuated in the proceeding, the fixed interest, payment of which was made contingent upon earnings, again becomes fixed after the lapse of the period provided for in such plan.

If the Commission had conditioned its approval of the abandonment upon a relocation, one result would be to saddle upon a system which has had difficulty meeting its fixed charges in the past, the burdensome cost of maintaining and operating an uneconomic line — and this would be true, even though the cost of relocating the line was added to the railroads' measure of damages.

Respectfully submitted,

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February 9, 1942

SUPREME COURT OF THE UNITED STATES.

No. 803.—October Term, 1941.

Steuart Purcell, Edmund Budnitz and Arthur H. Brice, Constituting The Public Service Commission of Maryland, and McCullough Coal Corporation, a Maryland Corporation, Appellants,

vs.

The United States of America, The Confluence and Oakland Railroad Company and The Baltimore and Ohio Railroad Company.

On Appeal from the District Court of the United States for the District of Maryland.

[March 2, 1942.]

Mr. Justice Black delivered the opinion of the Court.

A federal district court, composed of three judges in accordance with 28 U. S. C. § 47, dismissed the appellants' bill which prayed for the annulment of an order of the Interstate Commerce Commission. 41 F. Supp. 309. The order permitted the Confluence and Oakland Railroad Company, as owner, and the Baltimore and Ohio Railroad Company, as lessee, to abandon a railroad line approximately 20 miles long and to discontinue service entirely in the area now served: a semi-mountainous section along the Youghiogheny River between Confluence and Oakland Junction, Pennsylvania, and Kendall, Maryland. The appellants, who also appeared as protestants before the Interstate Commerce Commission, are the Public Service Commission of Maryland and the McCullough Coal Corporation, a coal mining company which alleges it will be forced out of business if railroad service is discontinued.

The application to the Commission for abandonment was not made because the line had been operating at a loss. On the contrary, the Commission concluded that there was no evidence that the line had theretofore been a burden on the Baltimore and Ohio system of which it was a part; or that a predictable decline in

the volume of traffic would make it one in the future, if it we allowed to continue in existence undisturbed. 244 I. C. C. 45 458; 247 I. C. C. 399, 401. But continued undisturbed existen would be an impossibility in view of a flood control project alread begun by the War Department under authority of an Act Congress. 52 Stat. 1215-1216. This project entails the constru tion of a dam which will create a reservoir covering an area which twelve miles of the line are now located. It is conceded that unless a new connecting section is built, the sections of th line not to be inundated—a detached six mile segment above th dam, and a one mile segment connecting with the main line the Baltimore and Ohio below it—would serve no practical pu pose justifying continued operation.

The appellants do not challenge the statutory authority the War Department to submerge the line as it proposes to d Nor do they suggest that the Commission could or should tak any action to deter completion of the project. Nevertheless, the contend that since "the sole reason for the abandonment w the flood control project, the application should have been denie forthwith by the Commission because of lack of jurisdiction t grant an abandonment on such ground." But under Sectio 1(18) of the Interstate Commerce Act the standard prescribe for the Commission in cases of this kind is whether "the prese or future public convenience and necessity permit of such aba donment." 49 U. S. C. §1(18). It is difficult to imagine wha consideration of present or future public convenience could rea sonably impel the Commission to decline to authorize abando ment of a line admittedly doomed to be rendered inoperable re gardless of what action the Commission might take. And th appellants suggest none. We must dismiss the appellants' con tention on this point as without merit.[1]

The appellants make the further argument that even if th Commission did not err in permitting abandonment of the lin

[1] Where projected inundation of a line made discontinuation of operation over it compulsory, the Commission has consistently given its authorizatio for abandonment. See Los Angeles & S. L. R. Co. Abandonment, 212 I. C. C 597, 598: "It is apparent from the record that under the circumstances state above the proposed abandonment is compulsory, and will not result in publi inconvenience." In some such situations the Commission has attached th condition of relocation. *E. g.*, St. Louis-S. F. Ry. Co. Trustees Abandonment 244 I. C. C. 485. In others, it has not. *E. g.*, Southern Ry. Co. Abandonment 217 I. C. C. 764.

its order cannot stand because of the failure to impose a condition that substitute service be provided by relocating the line.[2] After hearing testimony on the probable cost of relocation and the probable cost of maintaining a relocated line, the Commission concluded that "considering the expenditure necessarily incident to that relocation and the increased costs of operating the line that will be caused thereby, . . . we are not justified by the public convenience and necessity in taking action herein that will require the relocation of the line." The appellants do not contest the Commission's finding, amply supported by evidence, that the relocated line would require increased operating expenses. If the Commission had based its conclusion on this finding alone, there would seem to be no adequate ground for setting its order aside in judicial proceedings. The Commission did consider relocation costs, however, and the appellants contend that this was an improper consideration which invalidates its order.

In making this attack on the order, the appellants contend that under the statute authorizing the War Department to construct flood control projects, the cost of relocation would have to be borne by the government rather than the railroad. Cost thus borne would not affect the financial condition of the railroad itself, the appellants urge, and therefore there could be no such weakening of the railroad's capital structure as would adversely affect the transportation system. Hence, the argument continues, in that balancing of the interests of those now served by the present line on the one hand, and the interests of the carrier and the transportation system on the other which a proper disposition of abandonment applications requires, *Colorado* v. *United States*, 271 U. S. 153, the former interests must prevail. As the court below pointed out, however, "an uneconomic outlay of funds would not be in the interests of transportation even though the money be derived from the national government." This Court has recognized that operation of the national railway system without waste was one of the purposes the Transportation Act of 1920 was intended to further. *Texas* v. *United States*, 292 U. S. 522, 530; *Texas & Pac. Ry.* v. *Gulf, etc., Ry.*, 270 U. S. 266, 277. And a stated purpose of the Transportation

[2] The Commission is empowered to attach conditions by Section 1(20) of the Interstate Commerce Act which provides in part: "The commission . . . may attach . . . such terms and conditions as in its judgment the public convenience and necessity may require." 49 U. S. C. § 1(20).

Act of 1940, in the light of which Congress prescribed that the "Act shall be administered and enforced" is "to promote . . . adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers." 54 Stat. 899. When materials and labor are devoted to the building of a line in an amount that cannot be justified in terms of the reasonably predictable revenues, there is ample ground to support a conclusion that the expenditures are wasteful whoever foots the bill. The fostering care of the railroad system intrusted to the Commission is not so circumscribed as to leave it without authority to pass on the economic advisability of relocation in a situation where someone other than the carrier provides the money. The weight to be given to cost of a relocated line as against the adverse effects upon those served by the abandoned line is a matter which the experience of the Commission qualifies it to decide. And under the statute, it is not a matter for judicial redecision. Nor is there any indication in the Flood Control Act of 1938 that Congress desires to take away from the Commission any of the powers to make decisions of this kind which the Interstate Commerce Act had previously granted it.

The judgment of the court below is

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.